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518-071 O—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

ELLIOT L. RICHARDSON, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

ROBERT BUSTOS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Elliot L. Richardson, Attorney General, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit holding illegal the practice of admitting alien seasonal commuters as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B).

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–30) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 31–32) was entered on April 16, 1973. A Petition

for Clarification and Rehearing was denied on May 22, 1973. By order dated July 9, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether aliens who, having entered the United States as immigrants and possessing permanent resident entry documents, desire to commute on a seasonal basis from their homes in Canada or Mexico to places of employment in the United States, may properly be treated as duly admitted immigrants returning from temporary visits abroad.

STATUTES INVOLVED

8 U.S.C. 1101(a)(27)(B) provides:

> § 1101. Definitions.
>
> (a) As used in this chapter—
>
> * * * * *
>
> (27) The term "special immigrant" means—
>
> * * * * *
>
> (B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

8 U.S.C. 1181(b) provides:

> § 1181. Admission of immigrants into the United States.
>
> * * * * *
>
> (b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immi-

grants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title.

STATEMENT

On December 1, 1969, respondents brought a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California.[1] The complaint sought "a declaratory judgment under 28 U.S.C. 1331, an injunction and relief in the nature of mandamus" against the continued admission into the United States by the Immigration and Naturalization Service of alien "commuters"—*i.e.*, aliens previously authorized for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute daily or seasonally into this country to work. The complaint alleged that the practice of admitting aliens who once had valid immigrant visas but who now enter the country by use of their Alien Registration Receipt Cards violates applicable provisions of

[1] According to the complaint, respondents Robert Bustos, an American citizen, and Lupe Murquia, a Mexican alien permanently residing in the United States, are farm laborers in California. The United Farm Workers Organizing Committee, also a respondent herein, is a labor union representing farm laborers in California.

the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* On May 13, 1970, four Texas farm workers, each an American citizen or permanent alien resident of the United States, were permitted to intervene as plaintiffs on behalf of themselves and other farm workers in Texas.

On June 8, 1970, the parties agreed to a stipulation of pertinent facts (App. D, *infra*, pp. 34–37), after which cross-motions for summary judgment were filed. On December 21, 1971, the district court granted the government's motion for summary judgment (App. C, *infra* p. 33). The motions of plaintiffs and plaintiff-intervenors were denied, and the complaint was dismissed.

On appeal, respondents contended that alien commuters must have immigrant visas and a labor certification from the Secretary of Labor in order to enter the United States, that most commuters are properly non-immigrants who may not be admitted unless the Secretary of Labor determines that there is a labor shortage, and that commuters may not enter the country to take employment where a labor dispute exists, even if they have been previously employed there during a prior agricultural season.

On April 16, 1973, the court of appeals upheld the validity of the daily commuter procedure but ruled that the practice of admitting seasonal commuters as returning resident aliens was unlawful. The labor dispute claim was not reached. The case was remanded to the district court for proceedings consistent with the court of appeals' opinion (App. A, *infra*). On April 30,

1973, respondents filed a "Petition for Clarification and Rehearing" asking the court of appeals to designate as "seasonal commuters" those daily border crossers who are engaged in agricultural work and to rule favorably on the original third cause of action concerning commuters employed at the site of a labor dispute. The petition for clarification and rehearing was denied on May 22, 1973.

1. Most of the pertinent facts are not in dispute. The alien commuter procedure is not expressly authorized by statute. It was devised by immigration authorities in April 1927 in order to adapt a portion of the then long-standing border crossing system to the classification and documentary requirements of the Act of May 26, 1924, 43 Stat. 153. The rule established in 1927 was that an alien residing in Canada or Mexico and crossing the border to the United States for employment was classifiable as an immigrant and would have to have an initial admission for permanent residence with an immigration visa. That accomplished, he would thereafter be readmitted as a resident alien returning from a temporary visit abroad, notwithstanding that his actual place of residence continued to be in the contiguous country. He was called an "alien commuter." The basic rule was that a commuter could maintain that status by having stable and permanent employment in the United States but would lose it if he did not regularly work in the United States for six consecutive months.

Based upon their continuing eligibility for permanent residence, the Immigration and Naturalization

Service has considered such alien commuters as resident immigrants within the class defined in 8 U.S.C. 1101(a)(27)(B): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." This classification allows the Attorney General to admit the commuters, when they come here to work, pursuant to the informal documentation provisions of 8 U.S.C. 1181(b), and it exempts them on reentry from the labor certification provisions of 8 U.S.C. 1182(a)(14). Thus, the Attorney General has issued each commuter an alien registration receipt card (like that given resident aliens), upon presentation of which, and without more, commuters are allowed reentry into the United States. This practice, although not expressly sanctioned by statutory language, has been continuously followed since the first restrictive legislation in this area, the Immigration Act of 1924.

Respondents argued in the courts below that commuters are not within Section 1101(a)(27)(B) and thus are not eligible for the informal documentation privileges of Section 1181(b). In support of their argument, respondents cited a 1965 amendment to Section 1181(b). Prior to the amendment, the benefits of that section were available to "otherwise admissible aliens lawfully admitted for permanent residence *who depart from the United States temporarily*" (emphasis supplied). The amended version refers instead to "returning residence immigrants, defined in Section 1101(a)(27)(B) of this title, who are otherwise admissible" incorporating the Section 1101(a)(27)(B) defi-

nition of a returning resident immigrant as one who is "lawfully admitted for permanent residence [and] who is *returning from a temporary visit abroad*" (emphasis supplied). According to respondents, the clear meaning of the new language was to exclude the nonresident commuter from the informal documentation privileges of Section 1181(b) and the exemption from the labor certification requirements of Section 1182 (a)(14).

The government responded by detailing the long-standing and uninterrupted administrative practice under which commuters were and are considered resident immigrants within Section 1101(a)(27)(B) and have been accorded the benefits that follow from that classification. In the government's view, Congress—well aware of this classification—has not modified or disapproved it despite numerous reconsiderations of the general statutory pattern. Thus, the government argued below that the 1965 amendment did not affect commuters adversely, since they remain within the "resident" category of the statute as amended.

The facts relating to one area of dispute were not covered by the stipulation or developed in the district court. As part of their argument that commuters are required to have immigrant visas, respondents asserted (and petitioners herein denied) that the commuter practice is not supported by long, clear and consistent administrative practice. In particular, they asserted that the "seasonal commuter" procedure did not begin until 1965, following the termination of the "bracero" program (a contract labor arrangement

between the Governments of the United States and Mexico, pursuant to Public Law 78 of 1951, 65 Stat. 119). The government, conceding that there had not been an earlier separate formal concept of a seasonal commuter, maintained that this was only because theretofore this type of commuter had been merged in the general class, being not statistically conspicuous. The government denied that the practice was a post-1964 innovation.

2. In its decision, the court of appeals accepted the distinction between daily and seasonal commuters proffered by respondents. It acknowledged that the daily commuter procedure dates back more than 45 years, but spoke of the seasonal commuter system as a post-1964 creation of the Immigration and Naturalization Service. In the court's view, the daily commuter procedure had been sanctioned by administrative practice and remains valid, because Congress, knowing of the system, has left it unchanged through various enactments of immigration statutes. According to the court of appeals, the daily commuter procedure is a practice "vital to the lives of thousands of daily commuters on both sides of our land borders." Reversal of this practice "would cause severe dislocation and hardship" to persons who had "entered this country in reliance upon the immigration law as interpreted by the Service * * * despite the fact that they may have worked in this country for many years" (App. A, *infra*, pp. 28–29). The court took note of an affidavit submitted to the district court by the Secretary of State, William P. Rogers, on Octo-

ber 13, 1970 (*id.* at p. 29, n. 26). The affidavit outlined the role of the commuter procedure in the development of strong and mutually beneficial economic relations with Canada and Mexico and expressed concern at the possibility of a sudden judicial termination of the procedure. Secretary Rogers stated (App. E, *infra*, p. 38) that such a change would have "a serious deleterious effect upon our relations with both Mexico and Canada." The court of appeals construed this affidavit to apply only to daily commuters (App. A, *infra*, p. 29, n. 9).

The court of appeals did not regard the seasonal commuter procedure as having been sanctioned either by administrative practice or tacit congressional approval. According to the court, the seasonal procedure was "so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent [of the 1965 amendments, which strengthened the labor certification provisions of the Immigration Act], that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (*id.* at p. 30). The court held that, unlike the daily commuter, the seasonal commuter cannot be said to be "lawfully admitted for permanent residence" and is properly classified as a non-immigrant—"an alien having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor * * *" (8 U.S.C. 1101(a)(15)(H)).

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the courts of appeals for the District of Columbia and the Ninth Circuits on the question whether seasonal commuters are validy classified as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B). In 1970, in *Gooch* v. *Clark,* 433 F. 2d 74, certiorari denied, 402 U.S. 995, the Ninth Circuit upheld both the daily commuter procedure and the seasonal commuter procedure in the face of an attack by agricultural workers in California. The plaintiffs in *Gooch* presented the same issues and made the same arguments respondents did below. A divided panel held, in a thorough opinion by Judge Hufstedler, that both the daily and the seasonal commuter procedures (which the court did not legally differentiate) were not unlawful. In particular, it held that under the Immigration and Nationality Act the commuters were immigrants rather than nonimmigrants, that they have been lawfully admitted for permanent residence, and that on reentry they are returning from a temporary visit abroad. It also concluded that the 1965 amendments relied on by the District of Columbia Circuit in the present case cannot be read to bar the admission of either class of commuters.

This conflict between the decision of the District of Columbia Circuit and the decision of the Ninth Circuit in *Gooch* leaves the Service in a state of uncertainty as to how it should proceed. If the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens ad-

versely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment. The necessity for an authoritative decision by this Court is therefore compelling.

2. Whether seasonal commuters may properly be admitted to the United States as "returning resident aliens," entitled to enter without regard to the normal documentation required for admission of an immigrant (8 U.S.C. 1181(b)) and without regard to whether the Secretary of Labor has certified that there are not sufficient workers in this country available to do the work for which the alien is entering (8 U.S.C. 1182 (a)(14)), is an important question which will affect the foreign relations of the United States and the lives of thousands of aliens who are dependent upon seasonal employment in the United States for their livelihood.

Prior to the restrictive immigration legislation of 1924, persons from Canada and Mexico could freely cross to their jobs in the United States; no formal entry procedures were required. The commuter practice arose in response to the recognized need to continue free access to this country by such persons and was "predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M-D-S & L-G & W-D-C,* 8 I. & N. Dec. 209, 213. The decision below directly conflicts with this long tradition. The sudden termination of so long-standing an administrative practice would result in severe economic dislocation among the 8,500 seasonal commuters along both the Mexican and Cana-

dian borders. These persons have patterned their lives to conform to United States immigration law in this regard, and the decision below would strip them of a substantial source of their livelihood.

Moreover, we are advised by the Department of State that the concern expressed by the Secretary of State in his affidavit filed with district court (App. E, *infra*, pp. 38–40) that the termination of the commuter procedure would have "a serious deleterious effect upon our relations with both Mexico and Canada" applies to the seasonal commuter procedure as well as to daily commuters. The court of appeals below recognized that a termination of the daily commuter procedure might lead to an adverse and perhaps retaliatory response by Canada and Mexico (App. A, *infra*, p. 29, n. 26). The same kind of response could result from termination of the seasonal commuter procedure.

3. The district court did not hold an evidentiary hearing on the question when the practice of admitting seasonal commuters began. No findings of fact were made regarding this history, and it was thus improper for the court of appeals to conclude that the practice was a "synthetic construct hastily assembled" by the Immigration Service after termination of the bracero program.[2] The government believes

[2] Unlike the Mexicans who were admitted under the bracero program, all of the persons admitted under the daily and seasonal commuter procedures have met all of the requirements necessary to become immigrants. There is, therefore, no basis for suggesting that the seasonal commuter procedure is simply a direct substitute for the terminated bracero program.

that it should be permitted to show that the seasonal commuter procedure predated the termination of the bracero program and that the increased use of the procedure was a natural and not improper outgrowth of the revised structure of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ROBERT L. KEUCH,
JOHN T. SPOTILA,
Attorneys.

AUGUST 1973.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72–1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Decided April 16, 1973 [Judgment entered this date]

Bruce J. Terris, with whom *Joseph Onek* was on the brief for appellants. *John W. Karr* also entered an appearance for appellants.

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Ralph Farb, Attorney, Immigration and Naturalization Service, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Harold H. Titus, Jr.,* United States Attorney, *John A. Terry,* and *Gil Zimmerman,* Assistant United States Attorneys were on the brief for appellees.

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Court,* LEVENTHAL, *Circuit Judge,* and JOHN H. PRATT,** *United States District Judge for the United States District Court for the District of Columbia.*

Opinion for the Court filed by *District Judge* PRATT.

PRATT, *District Judge*: This case challenges the legality of the system whereby the Immigration and Naturalization Service [1] for many years has permitted and continues to permit Mexican aliens [2] to commute either daily or seasonally from their place of residence in Mexico to employment in the United States. Plaintiffs-appellants Robert Bustos, an American citizen, and Lupe Murquia, a Mexican national permanently residing in the United States, are farm workers in California. The United Farm Workers Organizing Committee is an organization of farm workers whose purpose is to secure higher wages and better working conditions for its members. The defendant-appellees are the Attorney General, the Commissioner of the Service, and the Regional Commissioner of the Service for the Southwest Region. The

*Sitting by designation pursuant to 28, U.S.C. § 291(a).

**Sitting by designation pursuant to 28, U.S.C. § 292(a).

[1] Hereinafter referred to as the "Service."

[2] Although the gravamen of the Complaint is directed solely toward the Mexican aspect of this problem, there is no gainsaying the fact that the same considerations are applicable to commuters from Canada.

defendants have the statutory responsibility of enforcing the immigration and naturalization laws of the United States.

Plaintiffs filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought declaratory and injunctive relief against the practice of the Service in admitting daily and seasonal commuters into the United States to perform agricultural labor. Five farm workers in Texas were permitted to intervene as plaintiffs for themselves and on behalf of all farm workers in Texas. There is no dispute as to any material facts. Acting on cross-motions, the District Court, on December 21, 1971, granted the motion for summary judgment of the defendants, denied the motions of plaintiffs and intervenor-plaintiffs, and dismissed the action. This appeal followed.

The issues raised by the parties on appeal are three. (1) Can aliens commuting daily or seasonally to work in the United States without maintaining residences in this country enter the United States without immigrant visas and without a certification by the Secretary of Labor that (a) there is a shortage of domestic labor of the kind the aliens are to perform, and (b) their employment will not affect wages and working conditions of American workers? (2) Are most commuters properly classifiable as non-immigrants who therefore may not be admitted into the United States unless the Secretary of Labor determines that no domestic labor is available? (3) Does 8 C.F.R. § 211.1 (b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they previously have been employed there? Plaintiffs content that the plain language of the statute and

the lack of a consistent administrative practice regarding commuters dictate a decision in their favor. The defendants join the issues by contending that the alien commuter system is the product of a long-standing consistent administrative application of the immigration laws and that Congress has repeatedly ratified the existence of this practice.

The Court is convinced that the parties have drawn the issues too broadly and consequently have not focused upon a vital distinction in the history of daily and seasonal commuters.[3] The distinction between these two types of commuters coupled with their relevant histories dictate the differing treatment we have given each of these classes of commuters.

I

The administrative treatment by the Service of the seasonal commuter aspect of this overall problem makes appropriate a brief reference to the origin and history of the bracero program. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico in 1943 initiated the bracero program to provide for the seasonal importation of Mexican agricultural workers,[4] In 1951, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the

[3] Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work. *See generally* 8 U.S.C. § 1101(a)(33) (1970).

[4] Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, effected August 4, 1942, 56 Stat. 1759.

agreement in order to protect domestic labor.[5] Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor. During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero program increased markedly. Despite the added safeguards to protect American labor, there arose a growing concern in the country over the program's adverse impact on domestic labor, Congress in 1964 therefore decided to allow the program to lapse.

Soon after Congress ended the bracero program, it amended in 1965 the Immigration and Nationality Act of 1952, the basic statute, to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market."[6] The most important change was to strengthen the labor certification process. Section 212 (a)(14) of the Immigration Act of 1952 had proved ineffective because an alien only could be excluded if the Secretary of Labor previously had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing those who had applied to immigrate to the United States or their prospective occupations, residences, or employers. The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States unless the Secretary of Labor has certified that there is not enough domestic manpower available to perform such tasks and that his employ-

[5] Act of July 12, 1951, 65 Stat. 119.

[6] H. Rep. No. 745, 89th Cong. 1st Sess. 18 (1965); S. Rep. No. 733, 89th Cong., 1st Sess. 10 (1965).

ment would not adversely affect the wages of American workers similarly employed. 8 U.S.C. § 1182(a) (14) (1970).

Despite this background, the Service after the termination of the bracero program in 1964 created a new class of commuter—a "new immigrant," the seasonal worker.[7] The Service has admitted that the "seasonal worker is a person who came into being largely after the repeal of the bracero law," and that "many of them are former braceros who have been admitted to the United States temporarily for employment under" the Act.[8] Thus, while the daily commuter can work only within a relatively short automobile drive of the border, the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers. While the bracero program had many protections designed to protect domestic labor, the ex-bracero as a seasonal commuter enters and leaves the United States freely, subject to none of the many safeguards for domestic labor which characterized the bracero program prior to its termination in 1964. The fact that Congress has

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[7] The Government at oral argument admitted that at least until the 1952 Act, the number of commuters who arguably could be called seasonal was "inconspicuous."

[8] Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Service, at the *Hearings on H.R. 12667, Employment of "Green Card" Aliens During Labor Disputes Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

approved the continued existence of the daily commuter program is no indication that it has approved a program which circumvents explicit expressions of Congressional concern for American labor, is a short-lived invention of the Service and which flies in the face of traditional Congressional concern for the American working man.[9]

More specifically, the Service, in order to reach this result, has interpreted seasonal commuters as "returning resident aliens," a class of immigrant not required upon re-entry to obtain immigrant visas. 8 U.S.C. § 1181(b) (1970). A returning resident alien is defined in the same Act as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 U.S.C. § 1101 (a)(27)(B) (1970). The regulations amplify this definition by describing returning resident aliens as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1(b)(1) (1972). As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case,[10] the construction of "lawfully admitted for permanent residence" as including commuters "makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others." In short, seasonal commuters are improperly classified as "returning resident aliens" and are not entitled to the benefits of such classification. The Service's practice is in violation of the clear and plain language of the statute.

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[9] The Court does not read the Secretary of State's affidavit as directed to the seasonal commuter system. See *infra* footnote 26.

[10] *Gooch* v. *Clark*, 433 F. 2d 74, 83 (9 Cir. 1970).

Aside from Congressional purpose and intent, we also find that seasonal commuters are properly to be classified as non-immigrants under the Act. Section 101(a)(15) of the Immigration and Nationality Act defines an immigrant as an alien not coming within ten categories of non-immigrants. 8 U.S.C. § 1101 (a)(15) (1970). A non-immigrant is there defined as—

> "[A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming *temporarily* to the United States to perform *temporary* services or labor. * * *" [Emphasis added.] 8 U.S.C. § 1101 (a)(15)(H) (1970).

This provision reflects the intention of Congress in the Act of 1952 to differentiate carefully between immigrants coming to the United States for permanent recidence and non-immigrants coming temporarily.[11] Congress, therefore, in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily to perform services or labor. The purpose of the provision was to allow the admission of certain workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production."[12]

Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or

[11] *See* H. Rep. No. 1365, 82d Cong., 2d Sess., 36–37 (1952).
[12] *Id.* at 45.

labor. Seasonal commuters involved in this case come clearly within that section.[13] The Service's practice of classifying seasonal commuters as "returning resident aliens" thus has no statutory warrant, is contrary to the intent of Congress, and is illegal.[14]

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[13] Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

[14] In view of our holding that seasonal commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)(15)(H), it is also plain that seasonal commuters who have previously come to the United States as immigrants admitted for permanent residence must now be considered as non-immigrants. The Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status. The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958). Consequently, when a seasonal commuter enters the United States today, the legality of his entry must be determined as of that time. Even if the seasonal commuter entered legally one or a score of times before as an immigrant, his entry must be re-evaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

For the purpose of identifying the class which will be affected by our ruling re seasonal commuters, the Court notes that the Service considers seasonal workers who are present in the United States for over six months each year to be permanent alien residents of the United States despite the fact that their actual dwelling place in fact may be in a foreign contiguous country. *Matter of Hoffman-Arrayo*, —— I. & N. —— No. 2095 (Sept. 7, 1971); I Gordon & Rosenfield, Immigration Law and Procedure, § 2.19 (1972 Supp.). The Government appears to have conceded that all commuters—with the exception of those commuters who live and work in the United States for more than six months each year—do not reside in the

II

On the other hand, the daily commuter system dates from 1927, more than 45 years ago. Its historical origin stems from a border crossing system of the nineteenth and early twentieth centuries as a result of which aliens living in Canada and Mexico, as well as United States citizens living in the United States, were able to travel freely into the adjoining country for pleasure, for business or for employment. This border crossing system in its legal aspect can best be described as an informal reciprocal arrangement between the Government of the United States and the Governments of Canada and Mexico. In 1917, pur-

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United States. This concession covers the large majority of seasonal commuters since most seasonal commuters stay in this country only for the harvest season, a period of four to six months depending on the crop. However, some commuters do stay over six months in the United States. It must be observed that these commuters also may be affected by the Court's ruling since the position of the Service in equating mere physical presence over the six months with residence in this country is without statutory or logical basis.

The definition of residence received its present form in the 1952 Act. 8 U.S.C. 1101(a)(33) (1970). Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." § 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33) (1970). Actual residence is not then synonymous with physical presence but is a question of fact to be determined in each case. *See In Re Olan*, 257 F.Supp. 884, 893 (S.D. Cal. 1966); *Petition for Naturalization of Castrinakis*, 179 F.Supp. 444, 446 (D. Md. 1959); *Toy Teung Kwong* v. *Acheson*, 97 F.Supp. 745 747 (N.D. Cal. 1951). If it is determined that workers coming seasonally to the United States for periods of over six months do in fact reside in a foreign contiguous country, they are seasonal commuters who fall within the framework of this decision.

suant to a directive in the Immigration Act of that year to expedite travel to the United States from Canada and Mexico, the Service prescribed an identification card for the use of those who resided on either side of the border and habitually crossed the boundary for legitimate purposes. Between 1917 and 1927, aliens to whom identification cards had been issued enjoyed border crossing privileges as long as they were not barred by any qualitative exclusion provision of the 1917 Act.[15] These rules for border crossers continued unchanged until April, 1927.

The 1924 Act did not repeal or modify the basic 1917 Act but was expressly declared to be an addition to and not a substitution for the 1917 law.[16] The 1924 Act classified all arriving aliens as either immigrants or non-immigrants. An immigrant was defined as any alien destined to the United States except one within any of the six enumerated non-immigrant classes.[17] As a result, by 1927 the Service in General Order No. 86, had decided that aliens residing in foreign contiguous countries and entering the United States to engage in employment would thereafter be considered "immigrants" who must first be admitted for permanent residence.[18] Those who achieved such admission within a grace period were permitted to enjoy the border crossing privilege. Paragraph Five of the General Order provided that "[a]liens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." Thus, the daily commuter was born.

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[15] *See* Act of February 5, 1917, §§ 3, 23; 39 Stat. 875, 892.

[16] Immigration Act of 1924, § 25; 43 Stat. 166.

[17] *Id.* § 3, 43 Stat. 154–55.

[18] General Order No. 86, Bureau of Immigration, April 1, 1927.

General Order No. 86 rested on the implied premise that the adaptation of the border crosser system to the Immigration Act of 1924 and its continued existence as the daily commuter system was in accord with the will of Congress. The 1924 Act had made no mention of border crossers as such. In the contemporaneous view of the administrative authorities it was plain, however, both from the statute itself and from its history, that Congress did not attempt to deal with the already long-standing border crossing system, and must not have intended to disturb it. In the 1924 Act, Congress was wholly preoccupied with restricting overseas immigration, particularly from certain countries in eastern and southern Europe. Meanwhile, the directive of the 1917 Act to facilitate border crossing remained on the statute books. Since then the Service has maintained control over the daily commuter system through administrative practice.

In 1952 the organic statute, the Immigration and Nationality Act, became law. This Act brought together the elements of both the 1917 and 1924 Acts and at the same time enacted certain new provisions. Daily commuters were not mentioned in the new law and its text and legislative history are silent on the subject. From this, the Service might well have concluded that it was the intent of Congress in the Act to permit alien commuters to continue to come to the United States in the same status they had enjoyed under the prior laws. Certainly, if Congress had intended with one stroke to outlaw the commuter system, thereby taking away the long-standing right of entry of aliens who had been admitted for permanent residence, there would have been some indication of such intent.[19]

[19] No mention of commuters is made in the 1965 amendments of the 1952 Act. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* 8 U.S.C. 1101 *et seq.* (1970).

In the light of the above history and administrative practice, it is fair to assume that the historic daily commuter practice known to Congress [20] was expected to continue unchanged in the 1952 law. Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice,[21] efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.[22]

The Court is also mindful that the plaintiffs place reliance on the plain language of 8 U.S.C. §§ 1181(b),

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[20] *See* S. REP. No. 1515, 81st Cong., 2d Sess., 535–36, 616 (1950).

[21] *See Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235 (1964). There concerning the reenactment rule, Mr. Justice Harlan, for a unanimous Court noted:

"Some weight is due to the consistent interpretation of the Maritime Commission, the agency entrusted with administration of the statute. . . . The successive extensions by Congress of the Commission's authority . . . are certainly not controlling, particularly since it does not appear that Congress ever advertently addressed itself to the claim of invaldity . . .: they do, however, strengthen to some extent the Commission's conclusions . . . . Needless to say, these 'interpretative aids,' neither singly nor in conjunction, could lead to an affirmance here if it were clear that the Commission's action contradicted the requirements of the . . . Act . . . However, they are consistent with, and lend support to, what we believe to be the most sensible view of the statutory framework."

Id. at 241–42. *See also* 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.07 (1958).

[22] Legislation was introduced into the 92nd Congress which would profoundly affect the commuter system. *See, e.g.*, S. 1373, 92d Cong., 1st Sess. (1971); S. 1488, 92d Cong., 1st Sess. (1971); H.R. 8746, 92d Cong., 1st Sess. (1971); H.R. 14831, 92d Cong., 2d Sess. (1972).

1101(a)(27)(B), and 1101(a)(20) (1970). The majority opinion in *Gooch* v. *Clark*, 433 F.2d 74, 78–81 (9 Cir. 1970), answers some of these contentions.[23] It should suffice to say that the statutory language is not as plain and unambiguous as plaintiffs contend.[24] Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. Daily commuters are often fully integrated into the United States economy, including—particularly in the case of commuters from Canada—membership in United States unions, and supervisory positions in United States business enterprises. Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

Finally, we are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardship. In

[23] The Court in *Gooch* did not sharply distinguish daily from seasonal commuters.

[24] *E.g.*, 433 F.2d at 78–79.

seeking an answer to the economic competition of ex-braceros who operate under the seasonable commuter system, plaintiffs seek the wholesale expulsion or exclusion from the United States of daily commuters who entered this country in reliance upon the immigration law as interpreted by the Service,[25] and despite the fact that they may have worked in this country for many years.[26]

Plaintiffs' request for relief is broader than is necessary to meet the burden of their complaint; they have used a broadsword when a rapier would have been more appropriate. We are unwilling to disregard this long-standing administrative practice by ordering a change of such far-reaching consequences and affirm the action of the District Court as it relates to daily commuters.

Our disposition differs from that proposed in *Gooch* by either the majority or dissent. While we have rooted our disposition in the statute as it stands, we have been particularly mindful of the need for construction in the light of a genuinely long-standing

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[25] *See Texas State AFL–CIO* v. *Kennedy*, 330 F.2d 217, 219 (D.C. Cir.) *cert. den.* 379 U.S. 826 (1964).

[26] Also involved are the Governments of Canada and Mexico. The Secretary of State, in an affidavit before the Court, has voiced the concern of these two neighboring countries at the possibility of a sudden judicial termination of the commuter system. In his considered judgment, such a change of policy would have "a serious deleterious effect" and "adversely affect" our relations with our two neighbors. Appendix at 52–54, Affidavit of Honorable William P. Rogers, Secretary of State of the United States, filed October 13, 1970. Although the Secretary for obvious reasons made no mention of the likelihood of an adverse response by Canada and Mexico against American nationals commuting daily to work in those two countries, the strong possibility of retaliatory measures by these countries requires no elaboration by us.

administrative practice in regard to daily commuters, a practice that we are convinced Congress did not mean to scrap, so far as concrete results of admittance of daily commuters are concerned. As to the post-1964 practice of the Service in regard to seasonal commuters, it is not only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

Accordingly, this case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX B

[Filed April 16, 1973, Hugh E. Kline, clerk]

United States Court of Appeals for the District of Columbia Circuit

September Term, 1972

Civil Action 3386–69
No. 72–1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72–1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Circuit,* LEVENTHAL, *Circuit Judge,* and JOHN H. PRATT,** *United States District Judge for the U.S. District Court for the District of Columbia.*

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Hugh E. Kline,
Clerk.

Dated: April 16, 1973

Opinion by District Judge Pratt.**

*Sitting by designation pursuant to 28 U.S.C. § 291(a).

**Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX C

[Filed December 21, 1971, James F. Davey, Clerk]

United States District Court for the District of Columbia

Civil Action No. 3386–69

ROBERT BUSTOS, ET AL., PLAINTIFFS

v.

JOHN H. MITCHELL, ET AL., DEFENDANTS

Order

This cause having come before the Court on the parties' cross-motions for summary judgment and upon consideration of the record and memoranda of the parties; and the Court being fully informed in the premises; and it appears to the Court that there exists no genuine issues of material facts and defendants are entitled to judgment as a matter of law,

It is by the Court this 21st day of December, 1971

ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be and it hereby is granted;

2. That the motions of the original plaintiffs and the intervenor-plaintiffs for summary judgment be, and they hereby are, denied; and

3. The action is hereby dismissed.

AUBREY E. ROBINSON, JR.,
United States District Judge.

APPENDIX D

Civil Action No. 3386–69

ROBERT BUSTOS AND LUPE MURQUIA, ON BEHALF OF THEMSELVES AND A CLASS OF PERSONS SIMILARLY SITUATED BUT TOO NUMEROUS TO MENTION; AND UNITED FARM WORKERS ORGANIZING COMMITTEE, AN UNINCORPORATED ASSOCIATION, PLAINTIFFS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES; RAYMOND FARRELL, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES; AND HARLAN B. CARTER, REGIONAL COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES, DEFENDANTS

Stipulation

Plaintiffs and defendants stipulate to the following facts, for the purpose of this case only:

1. Defendants are charged by law with the administration of the immigration laws of the United States.

2. The defendants and their predecessors have interpreted those laws as authorizing the admission of alien commuters. Such commuters are aliens who were originally admitted as permanent resident aliens with immigrant visas but who reside in adjacent countries and come to the United States daily or at other intervals for employment. Every alien admitted as an immigrant is issued an Alien Registration Receipt Card (Form I–151). The defendants recognize such a card as evidence of the holder's lawful admission

to the United States for permanent residence and his compliance with alien registration requirements, and also permit its use, under prescribed conditions, as a document entitling him to readmission to the United States as a returning resident immigrant, if he is otherwise admissible. Commuters are readmitted to resume or to seek work upon presentation of Form I–151 unless defendants find that they did not work at regular and stable employment in the United States within six months, in which event defendants consider the alien to have lost commuter status and to be not readmissible with Form I–151.

3. Since defendants regard alien commuters as aliens lawfully admitted for permanent residence who are returning to the United States after a temporary absence abroad, defendants have regarded such commuters as exempted by statute from the labor certification requirements prescribed by section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), as originally enacted in 1952 and as amended in 1965.

4. Since the inception of the alien commuter program, defendants, and their predecessors, have authorized the reentry of daily commuters upon presentation of a prescribed document showing their status as aliens lawfully admitted to the United States for permanent residence. Originally the prescribed document was known as a resident alien's border crossing card. In recent years the acceptable document presented by commuters upon their reentry is the Alien Registration Receipt Card (Form I–151), which is popularly known as the green card. In 1967, 8 CFR 211.1(b)(1) was amended by defendants, and their predecessors to proscribe use of Form I–151 by commuters who seek to enter the United States "primarily" to accept employment at a plant where the Secre-

tary of Labor has certified the existence of a labor dispute involving a work stoppage or layoff of employees.

5. The defendants construe the last sentence of 8 CFR 211.1(b)(1) as inapplicable to, and it is not being enforced by defendants against, aliens who are lawful residents of the United States, returning from a temporary absence outside the United States.

6. The defendants construe the last sentence of 8 CFR 211.1(b)(1) as applicable against alien commuters who are not residents of the United States, and who enter the United States to seek employment, whether daily or seasonally, at any place where the Secretary of Labor has certified the existence of a labor dispute involving work stoppage or layoff of employees, or to continue such employment commenced after the Secretary of Labor's certification.

7. Defendants regard the last sentence of 8 CFR 211.1(b)(1) as inapplicable to alien commuters coming to the United States from Canada or Mexico in possession of a Form I–151, if such aliens have been previously admitted for permanent residence, have been employed and living in the United States each year for more than six months in connection with seasonal employment, and seek to enter the United States to resume such residence and employment. Defendants regard such persons to be residents of the United States within the criteria, to which defendants now adhere, expounded by *Cermeno-Cerna* v. *Farrell,* 291 F. Supp. 521 (C.D. Cal., 1968), pending on appeal to the United States Court of Appeals for the Ninth Circuit, the decision of the special inquiry officer of the Department of Justice in *Matter of Benavides-Hino-*

josa, decided September 11, 1968, and the affidavit by the General Counsel of the Immigration and Naturalization Service submitted to the Court in *Cermeno-Cerna* v. *Farrell, supra.* Copies of that affidavit and of the special inquiry officer's unreported decision in *Matter of Benavides-Hinojosa, supra,* are attached. Defendants regard the last sentence of 8 CFR 211.1 (b)(1) as applicable to daily commuters and to other alien commuters who have not been employed and living in the United States for more than six months each year.

8. Defendants also regard the regulation as inapplicable to residents of Canada or Mexico who are maintaining status as commuters and who are returning to the United States for the purpose of continuing employment at a place where the Secretary of Labor has determined that a labor dispute exists, when such employment commenced prior to the date of the Secretary of Labor's determination. Defendants regard such employment as continuous if the alien commuter is returning on each occasion to the same employer, even if he has been absent from the United States for several months each year.

BRUCE J. TERRIS,
Attorney for Plaintiffs.

GIL ZIMMERMAN,
Assistant United States Attorney,
Attorney for Defendants.

CHARLES GORDON,
General Counsel, Immigration and Naturalization Service, Attorney for Defendants.

JUNE 8, 1970.

APPENDIX E

United States District Court for the District of Columbia

ROBERT BUSTOS, ET AL., PLAINTIFFS

against

JOHN MITCHELL, ET AL., DEFENDANTS

Affidavit of Honorable William P. Rogers, Secretary of State of the United States

1. I am the Secretary of State of the United States. Subject to direction of the President, I am responsible for the conduct of the foreign relations of the United States. I make this affidavit because the questions raised in plaintiffs' complaint have important implications for the relations of the United States with Mexico and Canada.

2. In my judgment, the long-established practice with regard to commuters across the borders of the United States contributes to the friendly relations of the United States with Mexico and Canada. A sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada.

3. The flow of persons and goods across the United States-Mexican border has helped the development of strong and mutually beneficial economic relations along the Mexican border. In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras Negras, Laredo and

Neuvo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.

4. The purchases by Mexican nationals of American goods on the United States side of the border constitute a major portion of retail sales on the United States side of the border. If as a result of a substantial reduction in the commuter traffic across the border between Mexico and the United States, a significant number of Mexican nationals would be deprived of their earning power, the trade between the two countries along the border would be substantially reduced. We could expect that this would have an immediate depressing effect on the economy of the region on both sides of the border.

5. In the last few years, the United States Government has taken steps to terminate the program of contract labor, which provided employment for many thousands of Mexican nationals in the United States. This action has had severe impact on the Mexican economy. The Congress has also acted in this area by extending the labor certification requirements of Section 212(a)(14) of the Immigration and Nationality Act to Western Hemisphere immigrants and by imposing an annual ceiling on Western Hemisphere immigration, effective July 1, 1968.

In contrast, Congress has not acted to restrict the commuter program although this long-standing administrative practice has been studied several times. The immigrant commuter has patterned his life to the form of United States law and practice, and a judicial termination of that practice would harm thousands of families and impact heavily on the Mexican economy.

6. The present practice with regard to commuters is

in effect not only at the border between the United States and Mexico, but also at the border between the United States and Canada. Canadian commuters, many of whom are union members, are a significant element in the economies of the United States and Canada, particularly in the Windsor-Detroit area. The sudden disruption of this traditional practice would be inconsistent with the trend toward closer economic cooperation with Canada exemplified by the 1965 Auto Agreement leading to a unified market in automotive products. The Government of Canada, like the Government of Mexico, has expressed its concern over litigation attacking the status of immigrant alien commuters. A judicial decision affecting the status of the Canadian commuters could also adversely affect our relations with Canada and the status of United States nationals and investment in Canada.

7. For the above reasons it is my opinion that judicial termination of the commuter system would be damaging to the foreign relations of the United States. Any adjustment that may be desirable should be fashioned by administrative or legislative processes which are better suited to distinguish situations and to accommodate conflicting interests.

WILLIAM P. ROGERS.

Subscribed and sworn to before me on the 21st day of April, 1970.

ERMINIA R. SCIARRINO,
Notary Public.

U.S. GOVERNMENT PRINTING OFFICE: 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ,
Petitioners

v.

ELLIOT C. RICHARDSON, Attorney General, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, pp. 20-34) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 35-36) was entered on April 16, 1973. The order of the court of appeals denying respondents' Petition for Clarification and Rehearing (App. D, *infra*, pp. 37-38) was denied on May 22, 1973. On August 22, 1973, Chief Justice Burger extended the time of petitioners for filing a petition for a writ of certiorari to and including September 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Mexican aliens who commute daily to the United States to work and who do not maintain residences in this country when they return each evening to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has a "residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform temporary services or labor" (8 U.S.C. 1101(a)(15)(H)).

STATUTES INVOLVED

8 U.S.C. 1101 provides in pertinent part:

§ 1101. Definitions.

(a) As used in this chapter—

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.

* * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully

accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. 1181(b) provides:

§ 1181. Admission of immigrants into the United States.

* * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Robert Bustos and Lupe Marquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 401, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is sufficient and the admission of farm laborers would ad-

versely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor" under 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has never issued such a certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations which prohibit commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1)) by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists merely because the commuter had previously worked for the same employer during a prior agricultural season.

On May 13, 1970, the district court granted the motion of the four petitioners, who are Texas farm workers, to intervene as plaintiffs on behalf of themselves and all farm workers in Texas. On June 8, 1970, the parties agreed to a stipulation of facts. On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs and plaintiff-intervenors for summary judgment, and dismissed the complaint (App. A, *infra*, p. 19).

On appeal, plaintiffs and plaintiff-intervenors renewed their arguments on all the claims described above. On April 16, 1973, the court of appeals held that, with re-

gard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contend. * * * [T]he concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his house in the suburbs is located in New Jersey or Connecticut" (App. B, *infra*, p. 32). The court said that since the practice began in 1927 and had continued for 45 years, and since Congress had never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 31). The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (App. B, *infra*, p. 26). Moreover, since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 27). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strengthened the

Immigration Act of 1965 to safeguard American labor (*id.* at 23-25).

On April 30, 1973, petitioners filed a Petition for Clarification and Rehearing limited to two points. First, petitioners contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. Petitioners, however, asked that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, petitioners asked that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (App. D, *infra*, pp. 37-38). However, the court explicitly did not determine the merits of the arguments advanced by petitioners. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal."

REASONS FOR GRANTING THE WRIT

1. The government has filed a petition for a writ of certiorari insofar as the court of appeals held that seasonal commuters are properly non-immigrants and, alternatively, even if they are immigrants, they cannot enter the United States pursuant to a green card without immigrant visas. No. 73-300. The farm workers have

filed a Brief in Opposition to that petition. As stated in the Brief in Opposition, we believe that review by this Court of the decision below is not warranted with regard to either daily or seasonal commuters. However, if the government's petition is granted as to seasonal commuters in No. 73-300, we submit that the issue of daily commuters should also be reviewed and that therefore this petition should be granted.

The alleged rights of daily and seasonal commuters to enter the United States pursuant to green cards are dependent on the identical statutory provisions and regulations. Much of the analysis of legislative history, administrative practice, and other materials is also relevant to both kinds of commuters. We therefore believe that, if review is to be granted as to any portion of the commuter practice, the entire issue should be before the Court.

2. The entry of daily commuters is of considerable more importance than of seasonal commuters. According to respondents' brief below, there are less than 8,300 seasonal commuters in comparison to over 45,000 daily commuters. Brief for Appellees, p. 3. These large numbers of daily commuters from Mexico cause unemployment and substantially lower wages for American workers in the towns along the border. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, pp. 116, 123, 127-128 (1968).

3. Petitioners further submit that the decision below is incorrect.

The Act defines an immigrant as an alien who does not come within any of the ten specified categories of non-immigrants. 8 U.S.C. 1101(a)(15). One of the categories of non-immigrants is "an alien having a residence

in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *." 8 U.S.C. 1101(a)(15(H). This definition applies precisely to persons whose permanent homes are and continue to be in Mexico, who come to the United States only for a portion of each day to provide temporary labor, and have no home in the United States.

Even if daily commuters are deemed immigrants, they are required to enter the United States pursuant to a valid immigrant visa. The general rule is that immigrants may not enter the United States without immigrant visas (8 U.S.C. 1181(a)) which in turn requires certification by the Secretary of Labor that their entry will not cause injury to domestic workers (8 U.S.C. 1182(a)(14)). The Act provides an exception "in such cases or in such classes of cases and under such conditions as may be by regulations prescribed" for "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1182(b). However, it is clear that daily commuters do not come within the exception on three distinct grounds.

First, daily commuters are not "returning resident immigrants." The Act defines "residence" to mean (8 U.S.C. 1101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that daily commuters, who by definition have their only home in Mexico and have no home in the United States (let alone a permanent one), have their "principal, actual dwelling place in fact" in Mexico and are not residents of the United States.

Second, daily commuters do not come within the definition of 8 U.S.C. 1101(a)(27)(B) because they are not

"lawfully admitted for permanent residence" and are not "returning from a temporary visit abroad." The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). While daily commuters were once lawfully accorded the privilege of residing permanently in the United States, their status has changed because they have not assumed residence in the United States. As Judge Eugene Wright demonstrated in his dissenting opinion in *Gooch* v. *Clark*, 433 F.2d 74 (1970), certiorari denied, 402 U.S. 955, any other interpretation of this definition of "lawfully admitted for permanent residence" "makes nonsense of the congressional policy embodied in no fewer than five sections of the Act [which also use this phrase] * * * and is entirely contrary to the plain meaning of two others." 433 F.2d at 83. In any event, a daily commuter entering the United States is not "returning from a temporary visit abroad"; on the contrary, since the daily commuter leaves his home in Mexico to come temporarily to the United States, his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico.

Third, 8 U.S.C. 1181(b) allows immigrants to enter the United States without immigrant visas only pursuant to regulations. The only applicable regulation is 8 C.F.R. 211.1(b)(1), which provides: "In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151." This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" was no mere inadvertence since it is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2. It is obvious that a daily commuter who has

his only home in Mexico and comes to the United States only to work does not have an "unrelinquished" and "permanent" residence in this country.

The court below responded to the clear language of the statute and regulation with two arguments:

First, the court said that a person's place of work could be considered his place of residence (App. B, *infra*, p. 32). However, this is directly inconsistent with the definition of residence in the statute as "the place of general abode," as "his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Moreover, the Service has admitted that its practice of admitting daily commuters with a green card does not fit within any language of the Act. Charles Gordon, the General Counsel of the Immigration Service has testified that the commuter status is "a device of convenience," "never specifically * * * authorized by statute." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee On Education and Labor, 91st Cong., 1st Sess. 181-182 (1969). He described the Service's practice as an "amiable fiction." *Id.* at 181, 186. Similarly, Gordon and Rosenfield in their treatise on immigration law state (*Immigration Law and Procedure*, Sec. 2.86):

> Where this employment [of Mexicans and Canadians] is permanent in character administrative ingenuity has devised a 'commuter' status, which enables the Canadian or Mexican to obtain lawful admission for permanent residence in order that he may be able to pursue his employment here, and his right to enter each day is attested by his alien registration receipt card. *Of course, this device is an amiable fiction, since the commuter is coming tempo-*

rarily and usually returns to his home in Canada or Mexico each night. [emphasis added]

In *Matter of H—— O——*, 5 I. & N. 716, 719, note 13 (1954), the Board of Immigration Appeals referred to "the fiction of a commuter's permanent residence coinciding with his place of employment * * *." Accord, *Matter of L——*, 8 I. & N. 643, 646 (1960); *Matter of J—— P——*, 9 I. & N. 591, 593-594 (1962); *Matter of Burciago-Salcedo*, 11 I. & N. 665, 667 (1966); *Matter of Gerhard*, 12 I. & N. 556, 557 (1967). Thus, the Immigration and Naturalization Service freely admits that the commuter practice is not authorized by any statute but was simply invented and continued to meet a need which the Service believed exists.

Second, the court of appeals said that the admission of daily commuters pursuant to a green card, unlike the admission of seasonal commuters, was based on a long-standing administrative practice which was well known to, and not changed by, Congress (App. B, *infra*, pp. 29-31).

While the court below correctly stated that the daily commuter practice began in 1924, it was of no importance until 1952. Since, prior to 1952, Mexican immigrants could readily obtain immigrant visas, the daily commuter system merely relieved them and the Service of the inconvenience of issuing an immigrant visa for each daily visit to the United States. In 1952, however Congress significantly limited the right of Mexican aliens to enter the United States by denying entry if the Secretary of Labor found that an economic threat would result, 66 Stat. 183. In 1965, Congress strengthened this provision by forbidding immigrants to enter unless the Secretary of Labor affirmatively determined that no threat to domestic labor existed. 8 U.S.C. 1182(a)(14).

Congress tightened the provisions relating to the entry of commuters in both the 1952 and 1965 Immigration

Acts. For example, while the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence" (Sec. 104), Congress defined "place of general abode" and therefore "residence" in the 1952 statute as the "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Prior to 1965, the Act allowed the entry, without an immigrant visa, of "otherwise admissable aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. This was changed in 1965 to its present wording of "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1181(b).

The Committee Reports accompanying the 1965 amendments do not specifically discuss the reason for the change in the wording of Section 211(b). However, all of the 1965 amendments must be interpreted in the light of their stated purpose to provide (S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965); H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)):

> Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market.

The specific purpose of the amendment to Section 211(b) becomes clear from the hearings conducted on "commuter workers" by the House Committee on Immigration and Naturalization prior to the 1965 amendments as part of a comprehensive study of population and immigration issues. *Study of Population and Immigration Problems*, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11 (1963). The Committee questioned the legality of the commuter practice and its adverse impact on the American economy. *Id.* at 166. During the course of the hearings, the Immigration Service relied on the pre-1965 version of 8

U.S.C. 1181(b) as the statutory basis for the commuter practice. L. Paul Winings, then General Counsel of the Service, insisted that it did not strain the language of that Section to call the commuter's absences from the United States "temporary departures." *Id.* at 169. He admitted, however, that the commuter practice did not fit within 8 U.S.C. 1101(a)(27)(B) which applies to "a temporary visit abroad." "One thinks of a visit as being, I presume, something away from a more permanent place." *Ibid.*

Walter Besterman, an authority on immigration law, who at the time of the 1963 hearings had been the Committee's legislative assistant for 17 years and who had been extremely influential in Congressional consideration of the 1952 Immigration Act, objected to this interpretation of the Act[1] (*id.* at 168-169):

> Is it your view of the very core of this problem that an immigrant who has not established permanent residence in the United States and is a commuter, in this class, is really complying with the law? Is his situation comparable to the status of the nonquota immigrant of the [8 U.S.C. 1101 (a)(27)(B)] class who is an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad?
>
> I am asking this question because you [Mr. Winings] mentioned earlier the situation of an immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family. That person would be, in my opinion, a returning immigrant when he comes back, regardless how often he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto.

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[1] Besterman, as the record of the hearings demonstrates, was speaking on behalf of the Subcommittee. *Id.* at 166, 167.

Besterman ended the Committee's examination of the legality of the commuter practice by tersely stating, "I do not want to prolong that. I think the facts are before the subcommittee." *Id.* at 169. The Committee responded to the Immigration Service's statutory defense of the commuter practice by removing the phrase which the Service relied upon to justify the admission of daily commuters without an immigrant visa and replacing it with a reference to another provision which the General Counsel of the Service admitted did not cover daily commuters. H.R. 2580, Sec. 9, in H. Rep. No. 745, 89th Cong., 1st Sess. 6 (1965).

This Court has generally looked with disfavor upon the proposition that reenactment of a statute constitutes legislative adoption of its administrative construction. *E.g., Commissioner* v. *Glenshaw Glass*, 348 U.S. 426, 431 (1955); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1940). As the Court stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119-120, 121 (1941):

> To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.
>
> * * * *
>
> Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Here, where the language of the statute and regulations are clear, where the Congress did not simply pass the statute but significantly tightened its provisions, where Congress' basic purpose was to protect American labor, and where the only legislative history indicates that Congress disapproved the commuter practice, there is no basis for concluding that Congress intended to approve the admission of daily commuters without immigrant visas.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted if this Court grants a writ of certiorari in No. 73-300.

Respectfully submitted,

BRUCE J. TERRIS
JOHN W. KARR
JOSEPH ONEK
Attorneys for Petitioners

SEPTEMBER 1973

APPENDIX A

[Filed December 21, 1971, James F. Davey, Clerk]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3386-69

ROBERT BUSTOS, ET AL., PLAINTIFFS

v.

JOHN H. MITCHELL, ET AL., DEFENDANTS

Order

This cause having come before the Court on the parties' cross-motion for summary judgment and upon consideration of the record and memoranda of the parties; and the Court being fully informed in the premises; and it appears to the Court that there exists no genuine issues of material facts and defendants are entitled to judgment as a matter of law,

It is by the Court this 21st day of December, 1971

ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be and it hereby is granted;

2. That the motions of the original plaintiffs and the intervenor-plaintiffs for summary judgment be, and they hereby are, denied; and

3. The action is hereby dismissed.

AUBREY E. ROBINSON, JR.,
United States District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Decided April 16, 1973 [Judgment entered this date]

Bruce J. Terris, with whom *Joseph Onek* was on the brief for appellants. *John W. Karr* also entered an appearance for appellants.

Ralph Farb, Attorney, Immigration and Naturalization Service, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Gil Zimmerman*, Assistant United States Attorneys were on the brief for appellees.

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Court*, LEVENTHAL, *Circuit Judge*, and JOHN H. PRATT,** *United States District Judge for the United States District Court for the District of Columbia.*

Opinion for the Court filed by *District Judge* PRATT.

PRATT, *District Judge*: This case challenges the legality of the system whereby the Immigration and Naturalization Service [1] for many years has permitted and continues to permit Mexican aliens [2] to commute either daily or seasonally from their place of residence in Mexico to employment in the United States. Plaintiffs-appellants Robert Bustos, an American citizen, and Lupe Murquia, a Mexican national permanently residing in the United States, are farm workers in California. The United Farm Workers Organizing Committee is an organization of farm workers whose purpose is to secure higher wages and better working conditions for its members. The defendant-appellees are the Attorney General, the Commissioner of the Service, and the Regional Commissioner of the Service for the Southwest Region. The defendants have the statutory responsibility of enforcing the immigration and naturalization laws of the United States.

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* Sitting by designation pursuant to 28, U.S.C. § 291(a).

** Sitting by designation pursuant to 28, U.S.C. § 292(a).

[1] Hereinafter referred to as the "Service."

[2] Although the gravamen of the Complaint is directed solely toward the Mexican aspect of this problem, there is no gainsaying the fact that the same considerations are applicable to commuters from Canada.

Plaintiffs filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought declaratory and injunctive relief against the practice of the Service in admitting daily and seasonal commuters into the United States to perform agricultural labor. Five farm workers in Texas were permitted to intervene as plaintiffs for themselves and on behalf of all farm workers in Texas. There is no dispute as to any material facts. Acting on cross-motions, the District Court, on December 21, 1971, granted the motion for summary judgment of the defendants, denied the motions of plaintiffs and intervenor-plaintiffs, and dismissed the action. This appeal followed.

The issues raised by the parties on appeal are three. (1) Can aliens commuting daily or seasonally to work in the United States without maintaining residences in this country enter the United States without immigrant visas and without a certification by the Secretary of Labor that (a) there is a shortage of domestic labor of the kind the aliens are to perform, and (b) their employment will not affect wages and working conditions of American workers? (2) Are most commuters properly classifiable as non-immigrants who therefore may not be admitted into the United States unless the Secretary of Labor determines that no domestic labor is available? (3) Does 8 C.F.R. § 211.1(b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they previously have been employed there? Plaintiffs contend that the plain language of the statute and the lack of a consistent administrative practice regarding commuters dictate a decision in their favor. The defendants join the issues by contending that the alien commuter system is the product of a long-standing consistent administrative application

of the immigration laws and that Congress has repeatedly ratified the existence of this practice.

The Court is convinced that the parties have drawn the issues too broadly and consequently have not focused upon a vital distinction in the history of daily and seasonal commuters.[3] The distinction between these two types of commuters coupled with their relevant histories dictate the differing treatment we have given each of these classs of commuters.

I

The administrative treatment by the Service of the seasonal commuter aspect of this overall problem makes appropriate a brief reference to the origin and history of the bracero program. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico in 1943 initiated the bracero program to provide for the seasonal importation of Mexican agricultural workers.[4] In 1951, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the agreement in order to protect domestic labor.[5] Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor. During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero

[3] Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work. *See generally* 8 U.S.C. § 1101(a)(33) (1970).

[4] Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, effected August 4, 1942, 56 Stat. 1759.

[5] Act of July 12, 1951, 65 Stat. 119.

program increased markedly. Despite the added safeguards to protect American labor, there arose a growing concern in the country over the program's adverse impact on domestic labor, Congress in 1964 therefore decided to allow the program to lapse.

Soon after Congress ended the bracero program, it amended in 1965 the Immigration and Nationality Act of 1952, the basic statute, to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." [6] The most important change was to strengthen the labor certification process. Section 212(a)(14) of the Immigration Act of 1952 had proved ineffective because an alien only could be excluded if the Secretary of Labor previously had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing those who had applied to immigrate to the United States or their prospective occupations, residences, or employers. The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States unless the Secretary of Labor has certified that there is not enough domestic manpower available to perform such tasks and that his employment would not adversely affect the wages of American workers similarly employed. 8 U.S.C. § 1182(a)(14) (1970).

Despite this background, the Service after the termination of the bracero program in 1964 created a new class of commuter—a "new immigrant," the seasonal worker.[7] The Service has admitted that the

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[6] H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965); S. Rep. No. 733, 89th Cong., 1st Sess. 10 (1965).

[7] The Government at oral argument admitted that at least until the 1952 Act, the number of commuters who arguably could be called seasonal was "inconspicuous."

"seasonal worker is a person who came into being largely after the repeal of the bracero law," and that "many of them are former braceros who have been admitted to the United States temporarily for employment under" the Act.[8] Thus, while the daily commuter can work only within a relatively short automobile drive of the border, the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers. While the bracero program had many protections designed to protect domestic labor, the ex-bracero as a seasonal commuter enters and leaves the United States freely, subject to none of the many safeguards for domestic labor which characterized the bracero program prior to its termination in 1964. The fact that Congress has approved the continued existence of the daily commuter program is no indication that it has approved a program which circumvents explicit expressions of Congressional concern for American labor, is a short-lived invention of the Service and which flies in the face of traditional Congressional concern for the American working man.[9]

More specifically, the Service, in order to reach this result, has interpreted seasonal commuters as "returning resident aliens," a class of immigrant not required upon re-entry to obtain immigrant visas. 8 U.S.C. § 1181(b)

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[8] Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Service, at the *Hearings on H.R. 12667, Employment of "Green Card" Aliens During Labor Disputes Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

[9] The Court does not read the Secretary of State's affidavit as directed to the seasonal commuter system. See *infra* footnote 26.

(1970). A returning resident alien is defined in the same Act as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 U.S.C. § 1101(a)(27)(B) (1970). The regulations amplify this definition by describing returning resident aliens as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1 (b)(1) (1972). As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case,[10] the construction of "lawfully admitted for permanent residence" as including commuters "makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others." In short, seasonal commuters are improperly classified as "returning resident aliens" and are not entitled to the benefits of such classification. The Service's practice is in violation of the clear and plain language of the statute.

Aside from Congressional purpose and intent, we also find that seasonal commuters are properly to be classified as non-immigrants under the Act. Section 101(a)(15) of the Immigration and Nationality Act defines an immigrant as an alien not coming within ten categories of non-immigrants. 8 U.S.C. § 1101(a)(15) (1970). A non-immigrant is there defined as—

> "[A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming *temporarily* to the United States to perform *temporary* services or labor. * * *" [Emphasis added.] 8 U.S.C. § 1101(a)(15)(H) (1970).

This provision reflects the intention of Congress in the Act of 1952 to differentiate carefully between immigrants

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[10] *Gooch* v. *Clark*, 433 F.2d 74, 83 (9 Cir. 1970).

coming to the United States for permanent residence and non-immigrants coming temporarily.[11] Congress, therefore, in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily to perform services or labor. The purpose of the provision was to allow the admission of certain workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." [12]

Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Seasonal commuters involved in this case come clearly within that section.[13] The Service's practice of classifying seasonal commuters as "returning resident aliens" thus has no statutory warrant, is contrary to the intent of Congress, and is illegal.[14]

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[11] *See* H. REP. No. 1365, 82d Cong., 2d Sess., 36-37 (1952).

[12] *Id.* at 45.

[13] Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

[14] In view of our holding that seasonal commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)(15)(H), it is also plain that seasonal commuters who have previously come to the United States as immigrants admitted for permanent residence must now be considered as non-immigrants. The Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status. The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is

no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958). Consequently, when a seasonal commuter enters the United States today, the legality of his entry must be determined as of that time. Even if the seasonal commuter entered legally one or a score of times before as an immigrant, his entry must be re-evaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

For the purpose of identifying the class which will be affected by our ruling re seasonal commuters, the Court notes that the Service considers seasonal workers who are present in the United States for over six months each year to be permanent alien residents of the United States despite the fact that their actual dwelling place in fact may be in a foreign contiguous country. *Matter of Hoffman-Arvayo*, —— I. & N. —— No. 2095 (Sept. 7, 1971); I GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 2.19 (1972 Supp.). The Government appears to have conceded that all commuters—with the exception of those commuters who live and work in the United States for more than six months each year—do not reside in the United States. This concession covers the large majority of seasonal commuters since most seasonal commuters stay in this country only for the harvest season, a period of four to six months depending on the crop. However, some commuters do stay over six months in the United States. It must be observed that these commuters also may be affected by the Court's ruling since the position of the Service in equating mere physical presence over the six months with residence in this country is without statutory or logical basis.

The definition of residence received its present form in the 1952 Act. 8 U.S.C. 1101(a)(33) (1970). Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." § 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33) (1970). Actual residence is not then synonymous with physical presence but is a question of fact to be determined in each case. *See In Re Olan*, 257 F.Supp. 884, 893 (S.D. Cal. 1966); *Petition for Naturalization of Castrinakis*, 179 F.Supp. 444, 446 (D. Md. 1959); *Toy Teung Kwong* v. *Acheson*, 97 F.Supp. 745 747 (N.D. Cal. 1951). If it is determined that workers coming seasonally to the United States for periods of over six months do in fact reside in a foreign contiguous country, they are seasonal commuters who fall within the framework of this decision.

II

On the other hand, the daily commuter system dates from 1927, more than 45 years ago. Its historical origin stems from a border crossing system of the nineteenth and early twentieth centuries as a result of which aliens living in Canada and Mexico, as well as United States citizens living in the United States, were able to travel freely into the adjoining country for pleasure, for business or for employment. This border crossing system in its legal aspect can best be described as an informal reciprocal arrangement between the Government of the United States and the Governments of Canada and Mexico. In 1917, pursuant to a directive in the Immigration Act of that year to expedite travel to the United States from Canada and Mexico, the Service prescribed an identification card for use of those who resided on either side of the border and habitually crossed the boundary for legitimate purposes. Between 1917 and 1927, aliens to whom identification cards had been issued enjoyed border crossing privileges as long as they were not barred by any qualitative exclusion provision of the 1917 Act.[15] These rules for border crossers continued unchanged until April, 1927.

The 1924 Act did not repeal or modify the basic 1917 Act but was expressly declared to be an addition to and not a substitution for the 1917 law.[16] The 1924 Act classified all arriving aliens as either immigrants or non-immigrants. An immigrant was defined as any alien destined to the United States except one within any of the six enumerated non-immigrant classes.[17] As a result, by 1927 the Service in General Order No. 86, had decided that aliens residing in foreign contiguous countries and entering the United States to engage in employment would thereafter be considered "immigrants"

[15] *See* Act of February 5, 1917, §§ 3, 23; 39 Stat. 875, 892.

[16] Immigration Act of 1924, § 25; 43 Stat. 166.

[17] *Id.* § 3, 43 Stat. 154-55.

who must first be admitted for permanent residence.[18] Those who achieved such admission within a grace period were permitted to enjoy the border crossing privilege. Paragraph Five of the General Order provided that "[a]liens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." Thus, the daily commuter was born.

General Order No. 86 rested on the implied premise that the adaptation of the border crosser system to the Immigration Act of 1924 and its continued existence as the daily commuter system was in accord with the will of Congress. The 1924 Act had made no mention of border crossers as such. In the contemporaneous view of the administrative authorities it was plain, however, both from the statute itself and from its history, that Congress did not attempt to deal with the already long-standing border crossing system, and must not have intended to disturb it. In the 1924 Act, Congress was wholly preoccupied with restricting overseas immigration, particularly from certain countries in eastern and southern Europe. Meanwhile, the directive of the 1917 Act to facilitate border crossing remained on the statute books. Since then the Service has maintained control over the daily commuter system through administrative practice.

In 1952 the organic statute, the Immigration and Nationality Act, became law. This Act brought together the elements of both the 1917 and 1924 Acts and at the same time enacted certain new provisions. Daily commuters were not mentioned in the new law and its text and legislative history are silent on the subject. From this, the Service might well have concluded that it was the intent of Congress in the Act to permit alien commuters to continue to come to the United States in the

[18] General Order No. 86, Bureau of Immigration, April 1, 1927.

same status they had enjoyed under the prior laws. Certainly, if Congress had intended with one stroke to outlaw the commuter system, thereby taking away the long-standing right of entry of aliens who had been admitted for permanent residence, there would have been some indication of such intent.[19]

In the light of the above history and administrative practice, it is fair to assume that the historic daily commuter practice known to Congress [20] was expected to continue unchanged in the 1952 law. Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice,[21] efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.[22]

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[19] No mention of commuters is made in the 1965 amendments of the 1952 Act. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* 8 U.S.C. 1101 *et seq.* (1970).

[20] *See* S. REP. No. 1515, 81st Cong., 2d Sess., 535-36, 616 (1950).

[21] *See Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235 (1964). There concerning the reenactment rule, Mr. Justice Harlan, for a unanimous Court noted:

"Some weight is due to the consistent interpretation of the Maritime Commission, the agency entrusted with administration of the statute. . . . The successive extensions by Congress of the Commission's authority . . . are certainly not controlling, particularly since it does not appear that Congress ever advertently addressed itself to the claim of invalidity . . .; they do, however, strengthen to some extent the Commission's conclusions . . . . Needless to say, these 'interpretative aids,' neither singly nor in conjunction, could lead to an affirmance here if it were clear that the Commission's action contradicted the requirements of the . . . Act . . . However, they are consistent with, and lend support to, what we believe to be the most sensible view of the statutory framework."

Id. at 241-42. *See also* 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.07, (1958).

[22] Legislation was introduced into the 92nd Congress which would profoundly affect the commuter system. *See, e.g.*, S. 1373, 92d Cong., 1st Sess. (1971); S. 1488, 92d Cong., 1st Sess. (1971); H.R. 8746, 92d Cong., 1st Sess. (1971); H.R. 14831, 92d Cong., 2d Sess. (1972).

The Court is also mindful that the plaintiffs place reliance on the plain language of 8 U.S.C. §§ 1181(b), 1101(a)(27)(B), and 1101(a)(20) (1970). The majority opinion in *Gooch* v. *Clark*, 433 F.2d 74, 78-81 (9 Cir. 1970), answers some of these contentions.[23] It should suffice to say that the statutory language is not as plain and unambiguous as plaintiffs contend.[24] Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. Daily commuters are often fully integrated into the United States economy including—particularly in the case of commuters from Canada—membership in United States unions, and supervisory positions in United States business enterprises. Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

Finally, we are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardship. In seeking an answer to

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[23] The Court in *Gooch* did not sharply distinguish daily from seasonal commuters.

[24] *E.g.*, 433 F.2d at 78-79.

the economic competition of ex-braceros who operate under the seasonable commuter system, plaintiffs seek the wholesale expulsion or exclusion from the United States of daily commuters who entered this country in reliance upon the immigration law as interpreted by the Service,[25] and despite the fact that they may have worked in this country for many years.[26]

Plaintiffs' request for relief is broader than is necessary to meet the burden of their complaint; they have used a broadsword when a rapier would have been more appropriate. We are unwilling to disregard this long-standing administrative practice by ordering a change of such far-reaching consequences and affirm the action of the District Court as it relates to daily commuters.

Our disposition differs from that proposed in *Gooch* by either the majority or dissent. While we have rooted our disposition in the statute as it stands, we have been particularly mindful of the need for construction in the light of a genuinely long-standing administrative practice in regard to daily commuters, a practice that we are convinced Congress did not mean to scrap, so far as concrete results of admittance of daily commuters are concerned. As to the post-1964 practice of the Service in

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[25] *See Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217, 219 (D.C. Cir.) *cert. den.* 379 U.S. 826 (1964).

[26] Also involved are the Governments of Canada and Mexico. The Secretary of State, in an affidavit before the Court, has voiced the concern of these two neighboring countries at the possibility of a sudden judicial termination of the commuter system. In his considered judgment, such a change of policy would have "a serious deleterious effect" and "adversely affect" our relations with our two neighbors. Appendix at 52-54, Affidavit of Honorable William P. Rogers, Secretary of State of the United States, filed October 13, 1970. Although the Secretary for obvious reasons made no mention of the likelihood of an adverse response by Canada and Mexico against American nationals commuting daily to work in those two countries, the strong possibility of retaliatory measures by these countries requires no elaboration by us.

regard to seasonal commuters, it is not only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

Accordingly, this case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX C

[Filed April 16, 1973, Hugh E. Kline, clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 3386-69

No. 72-1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Circuit*, LEVENTHAL, *Circuit Judge*, and JOHN H. PRATT,** *United States District Judge for the U.S. District Court for the District of Columbia.*

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Hugh E. Kline,
Clerk.

Dated: April 16, 1973

Opinion by District Judge Pratt.**

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

[Filed May 22, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-1178

Civil Action 3386-69

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1200
Civil Action 3386-69

ROBERT BUSTOS, ET AL.
CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Before: Edwards,* Circuit Judge for the Sixth Circuit; Leventhal, Circuit Judge and Pratt,** U.S. District Judge of the U.S. District Court for the District of Columbia.

ORDER

Appellants have filed a petition for clarification and rehearing with respect to this court's judgment of April 16, 1973. The Court is of the view that the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue. It is for the district court, in the first instance, to consider whether further relief is appropriate, in the implementation of our decision. If a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal. Accordingly, it is

ORDERED by the Court that appellants' aforesaid petition for classification and rehearing is denied.

Per Curiam

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

** Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

SUPREME COURT, U. S.

FILED

SEP 7 1973

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

ELLIOT L. RICHARDSON, Attorney General, *et al.*,
Petitioners,

vs.

ROBERT BUSTOS, *et al.*,

AMICUS CURIAE BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
No. 73-300

ELLIOT L. RICHARDSON, Attorney General, *et al.*,
Petitioners,

vs.

ROBERT BUSTOS, *et al.*,

AMICUS CURIAE BRIEF

Interest of Amicus Curiae.

The California Farm Bureau Federation is a nonprofit corporation organized under the laws of the State of California. It presently has approximately 62,000 members consisting primarily of farmers and others interested in farm problems in California. The American Farm Bureau Federation is a general farm organization with more than 2,000,000 member families who belong to state farm bureaus in 49 states and Puerto Rico. It is a voluntary, nonprofit corporation, organized under the laws of the State of Illinois. The National Council of Agricultural Employers is a nonprofit corporation organized in the District of Columbia, composed of members who are agricultural employers in 46 states.

This *amicus* brief is being filed because the decision of the Court of Appeals of the District of Colum-

bia would have a devastating impact on the agricultural economy of California, as well as other states along the Mexican and Canadian borders.

In California there are approximately 210,000 people employed in agriculture. Within this work force, approximately 150,000 are lawful permanent residents whose families have homes in Mexico and who would be affected adversely by the decision in the instant case. (See Appendix I.) If available, statistics from the States of New Mexico, Arizona and Texas would be similar.

The reason for the adverse effect lies in the potential impact the instant case would have on the long established policy of the Immigration and Naturalization Service ("Service") in admitting for entry to the United States any lawful permanent resident alien upon showing of an Alien Registration Receipt Card (Form I-151) pursuant to the provisions of 8 U.S.C. 1181(b) and the regulations at 8 C.F.R. 211.1(b)(1). This policy has allowed agricultural workers who are lawful permanent residents to be employed in the United States and have their families remain in Mexico and Canada for economic reasons. Such workers would commute across the border either daily or seasonally depending upon the distances between the places of employment and the border.

The decision of the Court of Appeals in the instant case destroyed this policy. The effect of that decision was to create two classes of aliens lawfully admitted for permanent residence. The first was the class of aliens who work in and whose families reside in the United States. The second was the class of aliens who work in the United States but whose families live either

in Mexico or Canada. The latter class of aliens were called "commuters" and it, in turn, was divided into two subcategories:

1. Aliens who commute daily between their employment in the United States and the homes of their families in Mexico or Canada;

2. Aliens who work in the United States, but visit their families in Mexico or Canada only seasonally.

After making this distinction, the Court held that petitioner Service should discriminate between lawful permanent resident aliens in enforcing the Immigration Act according to this classification system. Specifically, it held that the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) relating to entry into the United States should be denied to seasonal commuter aliens. It also sustained indirectly the right of the Service to enact and enforce discriminatory regulations against commuter aliens such as the so-called labor dispute regulations, *i.e.*, the last sentence of 8 C.F.R. 211.1(b)(1) referred to in Appendix D in the stipulation between petitioners and respondents. (pp. 34-36 of the Petition for Writ of Certiorari.)

The interest of the California Farm Bureau Federation, the American Farm Bureau Federation, and the National Council of Agricultural Employers, in this matter is clear. The classification system used by the Court of Appeals in the instant case and supported by respondent places the majority of workers in California agriculture in the most adversely affected subclass, *i.e.*, the seasonal commuter. American Farm Bureau Federation and the National Council of Agricultural Employers believe the same adverse effect will be found in the other states along the Mexican and Canadian

borders. It is the seasonal commuter alien who cannot take advantage of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1). This discriminatory policy would result in the loss of employment for these aliens and in the further loss to the California agricultural community of the services of these affected aliens.

REASONS FOR GRANTING THE WRIT.

I.

A conflict exists between the Courts of Appeals for the District of Columbia and the Ninth Circuit. The clash centers about the decision in the instant case and two Ninth Circuit decisions, *Gooch v. Clark,* 433 F.2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995, and *Sam Andrews' Sons v. Mitchell,* 457 F.2d 745 (9th Cir. 1972). In the instant case, the District of Columbia Court of Appeals set up a classification system for lawful permanent resident aliens. It first divided lawful permanent resident aliens into commuters and non-commuters and then further divided the commuters into two subclasses—seasonal and daily. It then held that the seasonal commuter could not be classified as a returning resident alien within the meaning of 8 U.S.C. 1101(a)(27)(B), and, consequently, could not take advantage of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1).

The Court further held that a seasonal commuter was a nonimmigrant under 8 U.S.C. 1101(a)(15)(H)(ii) of the Act. With this classification, a seasonal commuter could gain entrance into the United States only by obtaining an immigrant visa, which requires the obtaining of a labor clearance certificate from the Department of Labor under 8 U.S.C. 1182(a)(14) or

a temporary H-2 visa under 8 U.S.C. 1101(a)(15)(H)(ii). The two latter visas are impossible to obtain because they demand, as a prerequisite, a certification by the Secretary of Labor that a sufficient number of persons cannot be found in the United States to perform agricultural work. The Secretary of Labor, in his own regulations, has stated that he will not make such a certification. 29 C.F.R. 50.7, Schedule B. Thus, the effect of the decision of the Court of Appeals in the District of Columbia will be to force the seasonal commuter to choose between two alternatives—move his family into the United States, or, give up his permanent residence. As a result, the farmers of the State of California are faced with the possibility that a majority of their work force will be lost if the seasonal commuter aliens lose their permanent resident status and their legal right to work.

Under the same set of facts, the Court of Appeals for the Ninth Circuit in *Gooch v. Clark, supra,* reached an opposite decision. That Court held that any alien lawfully admitted for permanent residence, and employed in the United States, but who had a home in Mexico or Canada, could enter the United States on a daily or seasonal basis to work and still be classified as a returning resident alien within the meaning of 8 U.S.C. 1101(a)(27)B). Therefore, whether or not the alien had a home in Mexico or Canada was not a factor to be considered in allowing him the use of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1). It upheld the policy of permitting aliens legally admitted for permanent residence to gain admission into the United States by presenting the Form I-151 as an entry document.

The difference in effect between these two decisions on agriculture in California, Arizona, New Mexico and Texas cannot be overemphasized. The decision in the instant case will deny admission to the United States to lawful permanent resident aliens who are returning to employment after visiting their families in Mexico or Canada. The sustaining of the *Gooch* decision by this Court would allow the present practice to continue and would prevent these workers from losing their jobs in the United States and California agriculture from losing its main source of employees.

II.

There is a further conflict between the Courts of Appeals for the District of Columbia and for the Ninth Circuit on the issue of whether or not lawful permanent resident aliens can be classified as commuters or non-commuters for the purpose of enforcement of the Immigration Act.

The Court of Appeals for the District of Columbia, petitioner, and respondent have taken the position that lawful permanent resident aliens can be placed into three categories—non-commuter aliens, seasonal commuter aliens and daily commuter aliens.

1. Petitioner and the District Court for the District of Columbia have taken the position that the benefits of the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) should be made available to all three classes of lawful permanent residents. However, they both have taken the position that the last sentence of 8 C.F.R. 211.1(b)(1), *i.e.*, the labor dispute provision, can be lawfully imposed on daily commuter aliens.

2. Respondent's position has been that no commuter aliens could have the benefit of the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) and all such aliens can be prevented from entering the United States pursuant to the provisions of the last sentence of 8 C.F.R. 211.1(b)(1).

3. The Court of Appeals for the District of Columbia anchored its decision in the aforementioned three-part definition of lawful permanent resident alien. It held that the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) cannot be used by seasonal commuters, but could be used by all other lawful permanent residents. It did not consider the issue of the proper application of the provisions of the last sentence of 8 C.F.R. 211.1(b)(1).

In *San Andrews' Sons v. Mitchell, supra,* the Court of Appeals for the Ninth Circuit disagreed with all three positions. It held that the labor dispute provision of 8 C.F.R. 211.1(b)(1), *i.e.*, its last sentence, was invalid because the Service was not entitled to classify lawful permanent resident aliens into commuters and non-commuters for purposes of the enforcement of the Immigration Act.

It further held that the distinction between commuter and non-commuter aliens was neither rationally related to the administration of the Immigration Act, 457 F.2d at 748, nor was constitutional, 457 F.2d at 749.

The sustaining of the decision of the Ninth Circuit in *Sam Andrews' Sons v. Mitchell, supra,* as against the decision of the Court of Appeals of the District of Columbia in the instant case, would have three results. First, all lawful permanent resident aliens who are em-

ployed in the United States could be classified as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B), and, therefore, qualify for the documentary waiver provisions of 8 U.S.C. 1181(b). Second, the Immigration and Naturalization Service could no longer categorize lawful permanent resident aliens who had not moved their families to the United States as "commuters" and enact discriminatory regulations such as the labor dispute provision, *i.e.*, the last sentence of 8 C.F.R. 211.1(b)(1). Finally, organizations, such as those represented by respondents, could not pressure the Immigration and Naturalization Service into discriminating between lawful permanent residents when such discrimination might be to their advantage.

Conclusion.

The conflict between the decision of the Courts of Appeals of the District of Columbia and of the Ninth Circuit has created chaos and uncertainty as to the status of aliens lawfully admitted for permanent residence. This conflict can only be resolved by a decision of United States Supreme Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

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LEON L. GORDON,
WILLIAM S. MARRS,
MILTON C. GELENIAN,
By RONALD H. BONAPARTE,
Amici Curiae.

APPENDIX I.

The calculation that there are approximately 150,000 seasonal commuters working in the California agricultural economy was based upon an extrapolation of a survey. The 1971 total of 210,000 persons employed in California agriculture was the last figure available. Four representative farms were picked out in different areas of the state for an examination of their work force to see the number of seasonal commuters that they had in 1971. These figures, in turn, were used to calculate percentages for the entire state. The actual farms involved and the calculations are set forth on the following page.

Crop and Location	Total Employees	Aliens		Seasonal Commuters Who Work 6 Months or More in U.S. Each Year		Admission for LPR Prior to 1964	
		Number	Percentage	Number	Percentage	Number	Percentage
Lettuce and Melons Imperial Valley and Kern Cty.	490*	298	60.82%	Unknown		Unknown	
Strawberries Pajaro Valley Santa Cruz County	129*	119	92.24%	119	100.00%	44	36.97%
Wine Grapes Napa County	119	107	89.91%	105	98.13%	43	40.18%
Deciduous Fruits Butte County	49	48	97.96%	47	97.90%	17	35.41%
	787	572	72.70%	271**	98.81%	104**	37.96%
TOTAL WORK FORCE	210,200***	152,815****					

*Includes harvest workers.
**Figured on basis of last three crops.
***Rural Manpower Report, HRD.
****Extrapolated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ELLIOT C. RICHARDSON, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA,
PLACIDO RUIZ, AND JULIO RUIZ,

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

ELLIOT C. RICHARDSON, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA,
PLACIDO RUIZ, AND JULIO RUIZ.

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-30) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 31-32) was entered on April 16, 1973. The order of the court of appeals denying respondents' Petition for Clarification and Rehearing (App. A, *infra*, pp. 17-18) was decided on May 22, 1973. On July 9, 1973, the Chief Justice extended the time of petitioners for filing a petition for a writ of certiorari to and including August 14, 1973. The petition for a writ of certiorari was filed on

August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Mexican aliens who commute to the United States to work only during the agricultural season and who do not maintain residences in this country when they return to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101 (a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has "a residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States" to perform temporary services or labor" (8 U.S.C. 1101 (a)(15)(H)).

STATUTES INVOLVED

8 U.S.C. 1101 provides in pertinent part:

> § 1101. Definitions.
>
> (a) As used in this chapter—
>
> * * * *
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.
>
> * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. 1181(b) provides:

§ 1181. Admission of immigrants into the United States.

* * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Robert Bustos and Lupe Murquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 401, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is

sufficient and the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor" under 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has never issued such a certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations prohibiting commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1)), by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists merely because the commuter had previously worked for the same employer during a prior agricultural season.

On May 13, 1970, the district court granted the motion of the four respondents, who are Texas farm workers, to intervene as plaintiffs on behalf of themselves and all farm workers in Texas. On June 8, 1970, the parties agreed to a stipulation of facts (Pet. App. D, pp. 34-37). On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs and plaintiff-intervenors for summary judgment, and dismissed the complaint (Pet. App. C, p. 33).

On appeal, plaintiffs and plaintiff-intervenors renewed their arguments on all the claims described above. On

April 16, 1973, the court of appeals held that, with regard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contend. * * * [T]he concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City where he has a permanent commitment and interest in the ongoing vitality and soundness of the city, and where he may have, for example, fraternal and cultral associations, may well consider himself a New Yorker even though his house in the suburbs is located in New Jersey or Connecticut" (Pet. App. A, p. 28). The court said that since the practice began in 1927 and had continued for 45 years, and since Congress had never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 27). The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (Pet. App. A, p. 21). Moreover, since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 22-23). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strength-

ened the Immigration Act of 1965 to safeguard American labor (*id.* at 18-21).

On April 30, 1973, respondents filed a Petition for Clarification and Rehearing limited to two points. First, respondents contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. Respondents, however, asked that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, respondents asked that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (App. A, *infra*, pp. 17-18). However the court explicitly did not determine the merits of the arguments advanced by respondents. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal." [1]

[1] Petitioners' statement includes a brief description of the commuter system since 1927 (Pet. 6-7). While petitioners assert that "[m]ost of the pertinent facts are not in dispute" (*id.* at 6), the statutory and administrative history of the commuter practice, which is exceptionally complex, was strongly disputed as to both daily and seasonal commuters in the briefs filed by the parties in the court of appeals.

ARGUMENT

The decision of the court below is, as petitioners assert (Pet. 11), inconsistent with the two-to-one decision of the Court of Appeals for the Ninth Circuit in *Gooch* v. *Clark*, 433 F.2d 74 (1970), certiorari denied, 402 U.S. 955.[2] In *Gooch* the court held that both daily and seasonal commuters are returning resident immigrants, are not non-immigrants and therefore can enter the United States with a green card. Thus, the *Gooch* decision is inconsistent with that of the court below as to seasonal commuters.

Nonetheless, respondents submit that a writ of certiorari should not be granted for four reasons.[3]

1. First, a conflict of Circuits is a strong basis for seeking a writ of certiorari because such a conflict generally results in the application of different legal rules in different parts of the country. Thus this Court has stated that "[b]ecause of a subsequent contrary holding of the Court of Appeals for the Second Circuit * * * and the need for a uniform rule on this point, we granted certiorari to resolve the conflict." *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962). See also Stern & Gressman, *Supreme Court Practice* 154 (4th ed., 1969). Here, however, the court of appeals has made clear, by considering Canadian as well as Mexican commuters, that it was de-

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[2] Contrary, however, to the *amicus curiae* brief of the California Farm Bureau Federation, *et al.*, no conflict exists between the decision below and that of the Court of Appeals for the Ninth Circuit in *Sam Andrews' Sons* v. *Mitchell*, 457 F.2d 745 (1972). That case held that the strikebreaker provision in 8 C.F.R. 211.1(b)(1) was unauthorized by Congress and was therefore invalid. The court below did not reach respondents' contentions concerning the proper meaning of the regulation, let alone decide whether the regulation was valid.

[3] A conflict of circuits is of course not an automatic basis for a grant of certiorari. See Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953).

ciding the Service's legal obligations throughout the country. The district court, on remand from the court of appeals, will therefore presumably issue an injunction applying to the entire country.[4] Consequently, the court is not required to review the decision below in order to obtain a uniform national rule.

2. Second, review by this Court would appear to be premature. In *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, this Court said that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." The court of appeals has directed "the district court in the first instance, to consider whether further relief is appropriate, in the implementation of our decision" (App. A, *infra*, p. 18). The district court will also determine the issues relating to commuters who enter the country daily only during the agricultural season and the meaning of the strikebreaker regulation. After these issues have been resolved, and the relief determined both by the district court and court of appeals, this Court can appropriately decide whether to grant review. However, this Court is being asked to review at this time only a portion of the controversy.

3. The decision below, insofar as it relates only to seasonal commuters, is also of limited importance. According to petitioners' brief below, there are less than 8,300 seasonal commuters in comparison to over 45,000 daily commuters. Brief for Appellees, p. 3.[5] Moreover, as the court of appeals concluded (Pet. App. A, p. 9),

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[4] While it is conceivable that the district court's injunction would only apply to California and Texas and that the court of appeals would affirm such a limited injunction, this Court could review the case at that time as a result of the conflict of legal rules which would then be presented.

[5] While respondents estimated below that the number of seasonal commuters was much larger, petitioners claimed that their figures were based on actual counts made at the border.

the affidavit of the Secretary of State expressing concern about termination of the commuter practice was plainly directed toward the large numbers of commuters who travel across the border daily from nearby Mexican and Canadian communities.

4. Finally, respondents submit that the court below was correct in determining that commuters who live in Mexico and enter the United States only for the agricultural season cannot enter the United States pursuant to a green card. The decision below as to seasonal commuters must be upheld if either of its two alternative holdings was proper.

Most simply, the court of appeals properly found that seasonal commuters are non-immigrants under 8 U.S.C. 1101(a)(15)(H). The Act defines an immigrant as an alien not coming within the ten specified categories of non-immigrants. 8 U.S.C. 1101(a)(15). One of the categories of non-immigrants is "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *." 8 U.S.C. 1101(a)(15)(H). This definition applies precisely to persons whose permanent homes are and continue to be in Mexico and who come to the United States for only a portion of each year to provide temporary labor.

Even if seasonal commuters are deemed immigrants, the court of appeals correctly concluded that they are required to enter the United States pursuant to a valid immigrant visa. The general rule is that immigrants may not enter the United States without immigrant visas (8 U.S.C. 1181(a)) which in turn requires certification by the Secretary of Labor that their entry will not cause injury to domestic workers (8 U.S.C. 1182(a)(14)). The Act provides an exception "in such cases or in such classes of cases and under such conditions as

may be by regulations prescribed" for "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1182(b). However, it is clear that seasonal commuters do not come within this exception on three distinct grounds.

First, seasonal commuters are not "returning resident immigrants." The Act defines "residence" to mean (8 U.S.C. 1101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that seasonal commuters, who by definition have their permanent home in Mexico and have no permanent home in the United States, have their "principal, actual dwelling place in fact" in Mexico and are not residents of the United States.

Second, seasonal commuters do not come within the definition of 8 U.S.C. 1101(a)(27)(B) because they are not "lawfully admitted for permanent residence" and are not "returning from a temporary visit abroad." The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigrant laws, such status not having changed." 8 U.S.C. 1101(a)(20). While seasonal commuters were once lawfully accorded the privilege of residing permanently in the United States, their status has changed because they have not assumed residence in the United States. As Judge Eugene Wright demonstrated in his dissenting opinion in *Gooch* v. *Clark*, any other interpretation of the definition of "lawfully admitted for permanent residence" "makes nonsense of the congressional policy embodied in no fewer than five sections of the Act [which also use this phrase] * * * and is entirely contrary to the plain meaning of two others."

433 F.2d at 83. In any event, a seasonal commuter entering the United States is not "returning from a temporary visit abroad"; on the contrary, since the seasonal commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico.

Third, 8 U.S.C. 1181(b) allows immigrants to enter the United States without immigrant visas only pursuant to regulations. The only applicable regulation is 8 C.F.R. 211.1(b)(1) which provides: "In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151." This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" was no mere inadvertence since it is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2. It is obvious that a seasonal commuter who has his home in Mexico and comes to the United States for only part of a year does not have an "unrelinquished" and "permanent" residence in this country.

The court of appeals found (Pet. App. A, p. 30):

> As to the post-1964 practice of the Service in regard to seasonal commuters, it is not only recent in origin but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

When farmers in the southwestern United States saw that the end of the bracero program was near, they obtained immigrant visas for many of their Mexican workers. Thus, when the bracero program ended in 1964, many ex-

braceros, now nominally permanent resident aliens, started entering the country as seasonal commuters. Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues" in *Report of Select Commission on Western Hemisphere Immigration*, p. 104 (1968). As James S. Hennessy, the executive assistant to the Commissioner of the Service, testified before a House committee in 1969 (Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 70, 73 (1969)):

> A new class has come into being whom I would call the seasonal worker, a person who comes into the United States, for instance, at the opening of a growing season, has moved north as the crops mature; and at the end of the growing season, he has returned to Mexico.
>
> * * * *
>
> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

In response to written interrogatories posed by the Senate Subcommittee on Migratory Labor in 1970, the Service described the seasonal commuter as follows (INS Responses, p. 1-10):

> The seasonal worker or seasonal commuter is a relatively new concept under the immigration laws. It developed after the end of the bracero program in 1964 * * *.

Thus, the Service created a new class of commuters after 1964 to avoid the restrictions imposed by Congress in the Immigration Act. While petitioners now request a factual hearing on this issue (Pet. 13-14), they, as well as

respondents, moved for summary judgment in the district court on the ground that "there are no material facts concerning which there is any genuine issue." Defendants' Cross Motion for Summary Judgment, p. 1. Defendants did not request a factual hearing on this issue either in the district court or the court of appeals. On the contrary, they like respondents, relied upon various legislative and other materials to establish the history of the commuter system. They are not entitled to a factual hearing now that the court of appeals has properly found, based on the clear statements of the Service itself, that petitioners' position is not supported by any long-standing administrative practice (Pet. App. A, pp. 18-21).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.[6]

Respectfully submitted,

BRUCE J. TERRIS
JOHN W. KARR
JOSEPH ONEK
Attorneys for Respondents

SEPTEMBER 1973

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[6] Respondents are filing a petition for a writ of certiorari in this case. However, that petition will seek review only if the government's petition is granted. We believe that if this Court grants review concerning the commuter practice insofar as it involves seasonal commuters, it should also consider the same practice involving daily commuters. The Service's actions as to both seasonal and daily commuters are based upon the identical statutory provisions and regulations and are otherwise clearly interrelated.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1178

Civil Action 3386-69

[Filed May 22, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1200

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Before: Edwards,* Circuit Judge for the Sixth Circuit; Leventhal, Circuit Judge and Pratt,** U.S. District Judge of the U.S. District Court for the District of Columbia.

ORDER

Appellants have filed a petition for clarification and rehearing with respect to this court's judgment of April 16, 1973. The Court is of the view that the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue. It is for the district court, in the first instance, to consider whether further relief is appropriate, in the implementation of our decision. If a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal. Accordingly, it is

ORDERED by the Court that appellants' aforesaid petition for clarification and rehearing is denied.

Per Curiam

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

** Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-480

CRISTOBAL CARDONA, ET AL., PETITIONERS

v.

ROBERT H. BORK,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

On May 13, 1970, petitioners, representing themselves and other farm workers in Texas, intervened as plaintiffs in a class action brought by California farm workers in the United States District Court for the District of Columbia. The complaint sought declaratory and injunctive relief against the continued admission into the United States by the Immigration and Naturalization Service of alien "commuters"—*i.e.*, aliens previously authorized for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute daily or seasonally into this country to work. The complaint alleged that the practice of admitting aliens who once had valid immigrant visas but who now enter the country by use of their Alien Registration Receipt Cards violates applicable provisions of the Immigration and Nationality Act of 1952, 8 U.S.C.

1101, *et seq.* On December 21, 1971, the district court granted the government's motion for summary judgment (Pet. App. A).

On appeal, petitioners contended that alien commuters must have immigrant visas and a labor certification from the Secretary of Labor in order to enter the United States, that most commuters are properly non-immigrants who may not be admitted unless the Secretary of Labor determines that there is a labor shortage, and that commuters may not enter the country to take employment where a labor dispute exists, even if they have been previously employed there during a prior agricultural season. The court of appeals upheld the validity of the daily commuter procedure but ruled that the practice of admitting seasonal commuters as returning resident aliens was unlawful. The case was remanded to the district court for proceedings consistent with the court of appeals' opinion (Pet. App. B).

On August 14, 1973, the government filed a petition for a writ of certiorari (No. 73-300) to review that portion of the court of appeals' ruling which invalidated the practice of admitting seasonal commuters as returning resident aliens. Petitioners, who filed a brief in opposition to the government's petition, here seek review of the remaining portion of the court of appeals' ruling (upholding the practice of admitting alien daily commuters), but only in the event that the government's petition in No. 73-300 is granted (Pet. 9, 17).

The Court of Appeals for the Ninth Circuit, in *Gooch* v. *Clark*, 433 F. 2d 74, certiorari denied, 402 U.S. 995, has upheld both the daily and the seasonal commuter programs. The decision of the court below in the present case thus conflicts with that of the Ninth Circuit only on the issue presented in our petition:

whether the seasonal commuters may properly be treated as duly admitted immigrants returning from temporary visits abroad. The two courts are in agreement that daily commuters may be so treated.

We think both courts decided the daily commuter issue correctly. We agree with petitioners, however, that the legal issues respecting both classes of commuters are identical in many respects. Indeed, prior to the decision below in this case, it had been assumed by all that the daily and seasonal programs were legally indistinguishable (see Pet. App. 23).

We therefore suggest that it would be appropriate for the Court to grant the petition in this case if it grants the government's petition in No. 73-300. In that way, it could resolve the legal status of both classes of commuters in a single proceeding.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-480

CRISTOBAL CARDONA, *et al.*, *Cross-Petitioners,*

vs.

ELLIOT C. RICHARDSON, Attorney General, *Petitioner.*

No. 73-300

ELLIOT C. RICHARDSON, Attorney General, *et al.*, *Petitioners,*

vs.

ROBERT BUSTOS, *et al.*, *Cross-Petitioners.*

Brief on the Merits of American Farm Bureau Federation, California Farm Bureau Federation and National Council of Agricultural Employers, Amici Curiae.

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IN THE

Supreme Court of the United States

October Term, 1973
Nos. 73-480, 73-300

No. 73-480

CRISTOBAL CARDONA, *et al.*,

Cross-Petitioners,

vs.

ELLIOT C. RICHARDSON, Attorney General,

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No. 73-300

ELLIOT C. RICHARDSON, Attorney General, *et al.*,

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vs.

ROBERT BUSTOS, *et al.*,

Cross-Petitioners.

Brief on the Merits of American Farm Bureau Federation, California Farm Bureau Federation and National Council of Agricultural Employers, Amici Curiae.

Interest of Amici Curiae.

The California Farm Bureau Federation is a nonprofit corporation organized under the laws of the State of California. It presently has approximately 62,000 members consisting primarily of farmers and others interested in farm problems in California. The American Farm Bureau Federation is a general farm organiza-

tion with more than 2,000,000 member families who belong to state farm bureaus in 49 states and Puerto Rico. It is a voluntary, nonprofit corporation, organized under the laws of the State of Illinois. The National Council of Agricultural Employers is a nonprofit corporation organized in the District of Columbia, composed of members who are agricultural employers in 46 states.

The Respondents, Robert Bustos and Lupe Marquila, are two California farm workers; the Respondent, United Farm Workers Organizing Committee, is an organization of farm workers. The Respondents filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The Cross-Petitioners, Cristobal Cardona, Jose Maria de la Garza, Placido Ruiz, and Julio Ruiz, are Texas farm workers who are granted the right to intervene as plaintiffs on behalf of themselves and all farm workers in Texas.[1]

The *amici curiae* represent substantially all of the employers of the farm workers represented by Respondents. Any adverse decision made by the Court in this case will substantially damage a great portion of agricultural employers in states along the Mexican border.[2] The damage to *amici* would be the same type

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[1]Robert Bustos, *et al.*, are respondents in case number 73-300, *Attorney General v. Bustos*. Cristobal Cardona, *et al.*, are petitioners in case number 73-480, *Cardona v. Attorney General*. Both cases were consolidated for the purposes of filing briefs and oral argument by an order of the Court of Jan. 14, 1974. For the purpose of convenience in this brief, both respondents and cross-petitioners will be collectively referred to as "Respondents".

[2]In the *amici curiae* brief in support of Petition for Certiorari, originally filed in case number 73-300, the California Farm Bureau estimated that the adverse decision of the court below in

as that suffered by the California farming partnership known as Sam Andrews' Sons, outlined in *Sam Andrews' Sons v. Mitchell,* 457 F.2d 745 (9th Cir. 1972).

For example, in his Petition, the Attorney General said:

> "If the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment."[3]

The impact of such an order would be devastating to the employers represented by *amici* and to the agricultural economy of the United States.

Summary of Argument.

The Court of Appeals below classified as nonimmigrants all lawful permanent resident aliens who are employed in the United States, have their families reside in Mexico, and visit their families seasonally. Respondents would go further to have the classification include all lawful permanent residents who visit their families either daily or seasonally. Either order would violate the legislative intent of Congress, which has ratified the present and past policy of the Immigration and Naturalization Service to allow lawful permanent residents to work in the United States, have their families reside in Mexico or Canada and visit them on a daily or seasonal basis. This policy was first established in 1924, and has continued up to the present time. It is accom-

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Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973), affected 150,000 out of a work force of 210,000, or 71.4%. See also the statistics in a note entitled "Computers, Illegals and American Farm Labor Problem", at 48 NYU Law Review 339, 466.

[3]Petition of Elliot L. Richardson, pp. 11 and 12.

plished by the Service equating employment with residence so that the lawful permanent resident aliens involved can take advantage of the informal documentary waiver provisions of 8 USC 1181(b), and 8 CFR 211.1(b)(1), available for all lawful permanent residents defined by 8 USC 1101(a)(27)(b). The order made by the Court below and/or requested by Respondents would also violate the procedural due process rights of the lawful permanent residence aliens in that it would subject them to deportation or exclusion proceedings with a conclusive presumption of deportability, which they could not rebut by the introduction of other evidence.

The policy of the Attorney General of classifying lawful permanent resident aliens into commuters and noncommuters for purposes of enforcing certain immigration regulations, such as the labor dispute provision of 8 CFR 211.1(b)(1), is unlawful. Such a classification is not rationally related to the administration of the Immigration and Nationality Act.

Finally, daily or seasonal visits by lawful permanent resident aliens, who are employed in the United States, to their families who reside in Mexico, are not departures from the United States which can be regarded as meaningfully interruptive of the alien's permanent residence under the authority of *Rosenberg v. Fleuti* 374, US 449. Since such visits are not "entries" within the meaning of 8 USC 1101(a)(13), they cannot be used as a basis for bringing deportation or exclusion proceedings.

ARGUMENT.

I.

An Order That the Petitioner Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Reside in Mexico, and Visit Their Families Daily or Seasonally, Would Be Unlawful.

A. Respondents Seek Such an Unlawful Order From This Court.

Paramount to any argument is a clarification of the order which Respondents seek.

First, the order is to affect aliens who are lawful permanent residents of the United States.[4] Any lawful permanent resident alien would have been issued an immigrant visa, pursuant to 22 CFR 42.124. Such an alien would have then had to enter the United States, and a record of lawful admission for permanent residence would have had to have been created under 8 USC 1230(a). Such a procedure would have been recorded on form I-181, and only then would the alien have been issued his alien registration receipt card, form I-151. Gordon & Rosenfield, *Immigration Law and Procedure*, §6.17(a).

Second, the order affects an alien, after admission for permanent residence, who: (1) was employed in the United States; (2) had members of his family residing in and/or a family home in Mexico or Canada; and, (3) visited this home either daily or seasonally while employed in the United States.[4]

The Court of Appeals below held that the status of such a lawful permanent resident alien would be re-

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[4]Respondent's Cross-Petition, p. 10.

scinded, and he should be classified as a nonimmigrant under 8 USC 1101(a)(15)(h) of the Act, as long as his visits to his family are seasonal and not daily. *Bustos v. Mitchell,* 481 F.2d 479, 484 (D.C. Cir. 1973), footnote 14 emphasized.

Respondents go further. They wish the status of all lawful permanent resident aliens rescinded whether they visit their families in Mexico on a daily *or* seasonal basis. (Cross-Petition, p. 16.)

B. Any Affirmation of the Order Made by the Circuit Court Below, or the Granting of the Order Requested by Respondents, Would Violate the Legislative Intent of Congress as Shown by Its Ratification of Past Policy of the Immigration and Naturalization Service.

For the past 40 years, the Immigration and Naturalization Service has allowed a lawful permanent resident alien to work in the United States,[5] have his family reside in Mexico or Canada, and commute over the border for visits on either a daily or seasonal basis. A good summary of the rationale behind this policy is found in *Matter of Burciaga-Salcedo,* 11 I&N Dec. 665, 666 and 667, as follows:

"For generations prior to the Immigration Act of 1924, native and foreign-born citizens of foreign contiguous territory living there came daily to work in the United States and then returned to their homes. Immediately before the passage of the Immigration Act of 1924, they had been admitted as visitors on the basis of visitor's laws which were valid for a year and were good for successive applications for temporary admis-

[5]For purposes of convenience, the Immigration and Naturalization Service will be hereinafter referred to as the "Service".

sion. Passage of the 1924 Act raised a question as to whether a commuter was an immigrant rather than a visitor. The Act termed an alien an immigrant unless he proved he was a nonimmigrant. (An immigrant needed an immigrant visa—it was good for one entry only and could be issued only under restrictions not applicable to the issuance of nonimmigrant visas.) The nonimmigrant category pertinent to this discussion was that of the alien coming as a temporary visitor for 'business'. In this category the commuter was administratively first placed, permitting him to follow his regular employment in the United States and reside in foreign contiguous territory. Reluctance to disturb a long-standing custom, and reluctance to affect the delicate balance which existed between the United States and the contiguous countries dictated the decision. However, the pressure of other factors soon brought a change—there was a lack of specific law authorizing the entry of commuters as nonimmigrants, foreign-born citizens of contiguous territories who because of quota limitations could not obtain immigrant visas to enter the United States were, nevertheless, entering daily to work as commuters, and, there was rising unemployment in the United States—these factors gave rise to an administrative ruling that made the entry of commuters more difficult.

In 1927, it was administratively decided that under the 1924 Act an alien coming to work in the United States must be considered as an immigrant. (He could be admitted only if he had an immigrant visa and applied for admission for permanent residence.) Strict enforcement of this ruling would have seriously affected the livelihood of many on both sides of the border, the functioning of border cities, and the exist-

ence of friendly relations with the border nations. A compromise arose which followed the form of the law yet permitted a limited continuance of the commuter status. It was to treat the commuter who obtained an immigrant visa as if he lived in the United States although he continued to live in the contiguous territory.

An alien lawfully admitted for permanent residence and domiciled in the United States could be issued a border crossing card which authorized him to make a temporary visit to foreign continguous territory and to return to his home in the United States without presenting a new visa or other immigration document; therefore, why not require the commuter to obtain an immigrant visa, admit him for permanent residence, issue him a border crossing card, and then permit him, if he did not desire to live in the United States, to return to his home in foreign contiguous territory and to enter the United States daily on his border crossing card on the theory that he was returning from a temporary visit to contiguous territory? This arrangement was adopted in 1927.

There were difficulties in treating a commuter as if he was a domiciled alien. The alien actually domiciled in the United States attempting to enter as a returning resident with a border crossing card after a temporary visit outside the United States lost his right to reenter unless he established that he at all times maintained the intention of returning to his domicile in the United States. The commuter did not have a domicile in the United States and in many cases had no intention of moving here, was he therefore to be unrestricted in his right to reenter? The administrative solution was to equate employment with domicile. Then whether the

commuter was entitled to enter with his border crossing card as a returning resident turned on whether he was employed in the United States and whether he had ever abandoned the intention of working in the United States. This equality of treatment of the commuter and domiciled alien resulted in the ruling that since the domiciled alien lost his right to reenter the United States on a border crossing card if he was absent more than six months, the commuter lost his right to reenter on a border crossing card if he was unemployed for more than six months.

To treat the commuter as if he were a domiciled alien was a necessary if awkward fiction which permitted the practice to continue, but it was at odds with the administrative desire to have commuters make their homes in the United States. Soon rules concerning inspection and entry arose which made the commuter realize that not only would it be more convenient to live in the United States than to commute, but that loss of the right to enter the United States as a commuter could occur without his fault and even despite his intention to retain the right. Thus, the conclusive presumption arose that a commuter unemployed in the United States for more than six months had abandoned his intention to enter as a commuter—he could be readmitted to the United States to work only if he had a new immigrant visa. This conclusive presumption, with one exception, applied even though the commuter had retained the intention to commute and even though he had entered in the meantime to search for employment. This treatment was in contrast to that given the domiciled alien temporarily absent from the United States for more than six months; he, if he had not abandoned the intention to return, could be read-

mitted as a returning resident upon a waiver of the documentary requirements.

An exception to the conclusive presumption was made in the case of the commuter outside the United States for more than six months because of illness, accident, or pregnancy. With this background in mind, we may consider the facts in the case before us and the precedent decisions."[6]

This equation of employment with domicile was actually in accordance with the 1924 Act, which excepted from any quota restrictions aliens previously lawfully admitted to the United States as immigrants, returning after a temporary visit abroad. See §4(b) of the 1924 Act, 43 Statutes 155.

The classic set of decisions interpreting this section came in the U.S. Court of Appeals for the Second Circuit with Judge Learned Hand sitting on the panel. In *Lesto v. Day*, 21 F.2d 307 (2nd Cir., 1927), the Court said, at pp. 308 and 309, as follows:

> "Without attempting a complete definition of 'a temporary visit,' we may say that we think the intention of the departing immigrant must be to return within a period relatively short fixed by some early event."

This was followed by Judge Hand's decision in *Transatlantica Italiana v. Elting*, 66 F.2d 542 (2d Cir. 1933). The Court had to decide whether or not fines should be remitted in over 100 cases where

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[6]A more complete history of this background is found in "Aliens in the Fields: The 'Green Card Commuter' Under the Immigration and Naturalization Laws", 21 Stanford Law Review 1750 (1969); 48 NYU Law Review 439, *supra;* brief of appellees, Ramsey Clark, *et al.*, in *Gooch v. Clark;* 24788, 24791, United States Court of Appeals for the Ninth Circuit.

Italian aliens, who had been lawfully admitted for permanent residence, were held as "not returning from a temporary absence abroad" and were, therefore, excludable. There are printed in the Appendix the cases found on pages 546 through 552 of the Opinion, where it was ruled the aliens were returning from a temporary absence abroad. The importance is that in each of these cases, Italian aliens immigrated to the United States for purposes of employment, kept their families in Italy, visited them on a regular basis and were still held to be returning from a temporary visit abroad. The rationale was that the alien, while in Italy, had a fixed intent to return to the United States at a date certain and carried out that intent.[7]

This same rationale is seen in General Order No. 86, issued by the Service in 1927.[8] Sections 4 and 5 forced aliens living along the border who worked in the United States, to obtain immigrant visas, but did not require them to intend to establish, or in fact establish, the residence of their families in the United States. The Supreme Court, in turn, in *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929), sustained the validity of General Order No. 86.

> "After General Order No. 86 of 1927 the commuter regulations prior to 1952 had been greatly condensed and finally consisted of a single sentence:
>
> 'Aliens entering the United States to engage in existing employment or to seek employment in this country and who desire to continue to reside in

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[7]For a similar holding, see *Serpico v. Trudell*, 46 F.2d 669 (D.C. Vt. 1928).

[8]A verbatim copy of General Order No. 86 is set out in the Appendix.

foreign contiguous territory will be considered as aliens of the immigrant class.'

"After 1952 the substance of former 8 CFR 110.6 was republished as an internal Operations Instruction. The real 'rules' had been and continue to be the body of published administrative decisions on commuter cases. At any rate, on and after December 24, 1952, thousands of resident alien border-crossing card holders were permitted to cross the border on their way to work each day without interruption."[9]

Set forth in the Appendix is the result of a study of cases of the Board of Immigration Appeals, each one of which involves the exclusion of a lawful permanent resident alien whose family lived on the Mexican or Canadian side of the border. Each of these cases recognized the principle that a lawful permanent resident alien can be employed in the United States and still maintain a home for his family in Mexico or Canada. The difference in result is caused solely by the duration of employment.

The present policy of Petitioner is reflected in the Petition for Certiorari, pages 6 and 7, and the Stipulation of Facts set out on pages 34 and 35. Petitioner allows lawful permanent resident aliens to be employed in the United States, have their families reside in Mexico, visit them daily or seasonally, and be readmitted to the United States by presenting form I-151 at the border.[10]

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[9]Brief of Appellee, Attorney General, *Gooch v. Clark, supra,* pp. 42 and 43.

[10]The fact that the Service tried to limit the activities of "commuter" aliens through the enactment of the labor dispute provision of 8 CFR 211.1(b)(1) in 1967 will be discussed later.

C. Congress Has Ratified the Present Policy of the Service to Allow Lawful Permanent Resident Aliens Who Are Employed in the United States but Whose Families Live in Mexico or Canada the Privilege of the Informal Documentary Waiver Provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1).

As has been previously pointed out, from 1927 to the present date, the Service has followed the policy of allowing lawful permanent residents to be employed in the United States, have their families reside in Mexico or Canada, and be allowed the documentary waiver provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1). This was done in 1927 by General Order No. 86, which confirmed the practice as consistent with the statutory language of §4(b) of the Act. This defined a nonquota immigrant as "an immigrant previously lawfully admitted to the United States who is returning from a temporary visit aboard." The present practice is based on §1101(a)(27)(b) of the Act, which allows the informal documentary waiver provisions of 8 USC 1181(b) and 8 CFR 211.1(b)(1) for an alien lawfully admitted for permanent residence who is returning from a temporary visit abroad.

Respondents urge this Court to hold that this practice of the Service violates the statutory language of 8 USC 1101(a)(27)(b). Certainly, when an alien who is employed in the United States, leaves to spend one or a series of nights with his family across the border, his stay there is temporary because he intends to come back to resume employment. "'When statutes are susceptible of different readings, it is practically axiomatic that 'administrative interpretation practice and usage is accorded great weight as an extrinsic aid in interpretation of statutes by courts.' 3 Sutherland, *Statutory*

Construction, 6605 (Third Edition) 1943; *Halvering v. Winmill*, 305 U.S. 79; 59 Supreme Court 45; 83 *Lawyers Edition* 52 (1938). Such deference is paid by the courts, especially when the construction placed upon a statute by the administrative agency is contemporaneous with its enactment; the practice is long standing; or, the agency suggested the legislation subsequently enacted." *Lindberg v. Brenner*, 399 F.2d 990 (D.C. Cir. 1968).[11]

Since 1950, there have been numerous congressional hearings where "the commuter system" has been discussed. Three separate bills have been introduced which would affect "the commuter system".[12] Certainly, with the number of congressional hearings exploring the commuter system as affected by the decision of *Gooch v. Clark*, 433 F.2d 74 (9th Cir. 1970),[13] no one can accuse Congress of ignoring the problem.

In 1973, the House of Representatives passed the most complete revision of the Immigration and Nationality Act since 1965, HR 981 and HR 982.[14] The remarks of the chairman, the Honorable Peter W. Rodino, Jr., are made part of the Appendix. There is nothing either in HR 981, HR 982, or the remarks of Chairman Rodino to indicate Congress wishes to change the present "commuter system". Since the practice is longstanding and is known by Congress, which has made no effort to change it, the agency practice has been ratified.

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[11]See also *Massachusetts Trustees of Eastern Gas & Fuel Associate v. United States*, 377 U.S. 235 (1964).

[12]A summary of all the hearings as well as proposed legislation to end the commuter system is set forth in 21 Stanford Law Review 1750, *supra*, and 48 NYU Law Review 440, *supra*.

[13]48 NYU Law Review at 476 through 480, *supra*.

[14]HR 981 passed the House on September 26, 1973; HR 982 passed on May 3, 1973. Both are now pending in the Senate Subcommittee on Immigration of the Judiciary Committee.

D. Recent Court Decisions Would Allow the Equation of Employment With Residence for the Purpose of Defining Aliens Within the Coverage of 8 USC 1101(a)(27)(b).

Barrese v. Ryan, 203 F.Supp. 880 (District of Connecticut, 1962) and *Tejada v. United States Immigration and Naturalization Serv.*, 346 F.2d 385 (9th Cir. 1965) both deal with the definition of an alien within the coverage of 8 USC 1101(a)(27)(b). Barrese was a Canadian who worked in the United States and regularly visited his sisters in Canada. He would stay in Canada two weeks to 30 days at a time, but leave clothes in the United States. He was held to be a lawful permanent resident alien who was returning after a temporary absence abroad.

Tejada was a lawful permanent resident who left the United States for the Philippines in 1946 and reentered in 1962. The issue was whether or not his original eighteen month absence was of such sufficient duration so as not to be considered "temporary" within the meaning of 8 USC 1101(a)(27)(b) and 8 USC 1181(b). Although Tejada's family was in the Philippines and his only tie to the United States was employment, the court ruled that as a matter of law, he might be eligible for reentry and remanded the matter for further administrative findings.

In *Cermeno-Cerna v. Farrell*, 291 F.Supp. 521 (C.D. Calif. 1968), fifteen lawful permanent resident aliens challenged the legality of their arrest and subsequent deportation proceedings under the labor dispute provisions of 8 CFR 211.1(b)(1). They were arrested because the Immigration Service contended they were "commuters" who worked in the United States, but lived in Mexico where their families resided. The Court held

the aliens were within the provisions of 8 USC 1101 (a)(27)(b); and, thus, not deportable, because of the following evidence:

> "The evidence as presented by each of the individual plaintiffs shows that each have been admitted for permanent residence in the United States and when leaving their residence, either from labor camps supplied by their employers or from rented homes, they left belongings in the United States and in each instance intended to return after a vacation to rest and visit with their families and friends." 291 F.Supp. at 530.

Finally, when a statute is capable of several meanings, recent court decisions have affirmed a policy of giving that meaning to it which would prevent deportation or exclusion.

> "Although it is not penal in character and not subject to the constitutional inhibition against the passage of an *ex post facto* law, deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings." [cites omitted] *United States v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956).

In summary, even if one concedes that 8 USC 1101 (a)(27)(b) is capable of two different meanings, one equating employment with residence; and the other against such an equation, the fact that the latter would mean deportation or exclusion of thousands of aliens should be sufficient to prevent its adoption.[15]

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[15]For a further discussion of the hardship the end of the "commuter" program might cause, see 48 NYU Law Review at 475-6.

E. The Order Made by the Court Below and/or the Order Proposed by Respondents That the Immigration Service Classify as Nonimmigrants All Lawful Permanent Resident Aliens Who Are Employed in the United States, Have Their Families Residing in Mexico and Visit Them Daily or Seasonally, Would Violate the Procedural Due Process Rights of the Aliens Affected.

The court below in *Bustos v. Mitchell, supra,* held that all lawful permanent resident aliens which fit into the court's definition of seasonal commuters, must immediately be considered as nonimmigrants by the Service for purposes of enforcing the Immigration Act. 481 F.2d at 484. Respondents, in their Petition, ask that the order be expanded to affect all lawful permanent resident aliens which are classified as daily and seasonal commuters. The Attorney General, in judging the impact of these statements, has said that "if the seasonal commuter system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them reentry for the purpose of seeking or returning to employment." (Petition, at pp. 11 and 12.)

The order made by the court below and/or proposed by Respondents, would violate the procedural due process rights of the lawful permanent resident aliens involved, by establishing in deportation and/or exclusion proceedings a conclusive presumption that any lawful permanent resident alien whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country and who commutes daily or seasonally to work in the United States is not within

the coverage of 1101(a)(27)(b) of the Act regardless of any other evidence which might be produced to the contrary. 481 F.2d at 482.[16]

In the *Japanese Immigrant Case*, 189 U.S. 86, 100 to 101 (1903), this court in emphatic and unmistakable terms rejected any supposition that deportation could be ordered without a fair hearing for the alien involved. The Eight Circuit in *Whitfield v. Hanjes*, 222 Fed. 745 (8th Cir. 1915), discussed the *Japanese Immigrant Case, supra*, and summarized the essential elements of a fair hearing at page 749 as follows:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him, that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

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[16] *Amici* agree that it would be possible for a lawful permanent resident alien to lose contact with the United States in such a way that he would not be returning from a temporary absence abroad; and, therefore, would be deportable and/or excludable. But certainly, the requirements of procedural due process would prevent any conclusive presumptions in an administrative hearing and would give the alien the right to present all evidence in his behalf.

This Court has followed these decisions in giving the same protection of procedural due process to lawful permanent resident aliens as to citizens. In *Bridges v. Wixson,* 326 U.S. 135, it ruled that the alien had been ordered deported without a fair hearing and reversed the judgment of the court below. Justice Murphy concurring, stated that a lawful permanent resident alien was ". . . invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment." 326 U.S. at 161.

In *Kowng Hai Chew v. Colding,* 344 U.S. 590 (1952), this Court held that a lawful permanent resident alien who went outside the United States on a vessel of American registry, with its home port in the United States, and upon completion of such voyage returned on such vessel to the United States was, from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment. What is important is that the court held this to be true for purposes of both a deportation and/or an exclusion hearing. 344 U.S. at pages 600 to 602.

More recently, in *Graham v. Richardson,* 403 U.S. 365, 376, this Court held that ". . . a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years, violate the equal protection clause."

These cases illustrate the vice of the blanket order made by the court below and/or urged by Respondents. Any order that would conclusively prevent lawful permanent resident aliens from producing evidence

to show that they were in fact within the coverage of 8 USC 1101(a)(27)(b) would violate procedural due process of law.

II.

The Policy of the Attorney General of Classifying Lawful Permanent Resident Aliens Into Commuters and Noncommuters for Purposes of Enforcing the Immigration Act, Is Unlawful.

Although the Service acknowledges that all lawful permanent resident aliens should receive the benefits of the documentary waiver provisions of 8 USC 1181 (b) and 8 CFR 211.1(b)(1),[17] it still claims the right to classify lawful permanent resident aliens into commuters and noncommuters for purposes of enforcement of other parts of the Immigration and Nationality Act. For example, the labor dispute provision of 8 CFR 211.1(b)(1), is acknowledged by Petitioner in the Stipulation of Facts to be applicable to "commuter" lawful permanent resident aliens only.[18]

The question of the validity of this provision was raised by the Circuit Court below in *Bustos v. Mitchell, supra,* when it asked ". . . does 8 CFR 211.1(b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they have previously been employed there?" 481 F.2d at 481. The question of the validity of the Service's position on this regulation was raised by Respondent in its Cross-Petition on pages 6 and 8.

In *Sam Andrews' Sons v. Mitchell, supra,* the Ninth Circuit held this labor dispute provision illegal.[19] The

[17]*Gooch v. Clark, supra.*

[18]Petition of Attorney General, pp. 35-37.

[19]It should be noted that Justice Wright, who wrote the dissent in *Gooch v. Clark, supra,* joined the unanimous panel in holding this provision illegal.

Court first noted that the labor dispute regulation and the Government's interpretation and application of it created two distinctions: ". . . first and primarily, the distinction between the commuter who works for a certified employer and the commuter who does not; and second, the distinction between the commuter and otherwise similar §1101(a)(27)(b) immigrants who permanently reside in the United States." 457 F.2d at 748. The Court held that in accordance with *Fook Hong Mak v. Immigration and Naturalization Service*, 435 F.2d 730 (2nd Cir. 1970), the Attorney General had the right to make regulations on considerations rationally related to the statute he is administering, but it held that the classifications made by the Service in this case were not rationally related to the administration of the Immigration and Nationality Act. At page 748 it stated as follows:

> "Nothing in the statute or its legislative history supports continuing regulation of alien laborers by the Secretary of Labor or by the Attorney General. Cermeno-Cerna v. Farrell, 291 F.Supp. 521, 528 (C.D., Cal., 1968). Congress empowered the Secretary and the Attorney General to regulate the initial entry of an alien into the United States, but once a commuter has been lawfully admitted, he may 'make regular entrances into the United States as an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad." ' *Gooch, supra*, 433 F.2d at 81.
>
> There is nothing in the statute or its legislative history intimating that Congress intended the green card system to be used as a means of Government intervention in domestic labor disputes."

As to the argument that the distinction could be discretion, it held that ". . . there is no rational basis to distinguish between commuters and resident §1101 (a)(27)(b) immigrants, as the District Court recognized that the commuter and the resident alien have the same immigration status." 452 F.2d at 749. It concluded, citing *Graham v. Richardson, supra,* as follows:

> "The commuter when on the job in the United States is entitled to full constitutional protection. His constitutional status is not terminated, altered or diminished because he spends the night across the border. *See Kwong Hai Chew, supra.* Such a departure is merely a 'temporary visit abroad.' *Gooch, supra,* 433 F.2d at 79-81." 457 F.2d at 749.[20]

Amici urges the Court to affirm the decision of the Ninth Circuit in *Sam Andrews' Sons v. Mitchell, supra.* Such affirmation could prevent the Service from categorizing those lawful permanent resident aliens who had not moved their families to the United States as "commuters" and enacting discriminatory regulations against them, such as the labor dispute provision of 8 CFR 211.1(b)(1). At the same time, such affirmation could prevent orgaizations, such as those represented by Respondents from pressuring the Service into discriminating between lawful permanent residents when such discrimination might be to their advantage.

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[20]When the court used the term "constitutional protection", it did not explain whether it was talking about procedural due process or substantive due process. Because of the problems involved in granting substantive due process to aliens (*Bridges v. Wixon, supra; Harisiades v. Shaughnessy,* 342 US 580 [1952]), and because the Court decided that the regulation violated the legislative intent of Congress, we have not reached the question of whether or not the classification violates the constitutional rights of the aliens involved.

III.

Daily or Seasonal Visits by Lawful Permanent Resident Aliens, Who Are Employed in the United States, to Their Families Who Reside in Mexico, Are Not Departures From the United States Which Can Be Regarded as Meaningfully Interruptive of the Aliens' Permanent Residence.

In *Rosenberg v. Fleuti,* 374 U.S. 449, this Court considered the issue of whether a permanent residence alien's return to the United States from his afternoon trip to Ensenada, Mexico, constituted an "entry" within the meaning of §101(a)(13) of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 USC §1101(a)(13), such that said alien was excludable for a condition existing at that time even though he had been permanently and continuously a resident in this country for several years prior thereto.[21] More specifically, the Court considered whether the alien's short visit to Mexico could be regarded as a "departure to a foreign port or place . . . [that] was not intended" within the meaning of the exception to the term "entry" created by said statute. The Court concluded, at page 462:

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[21]Section 101(a)(13) provides:

"The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

"We conclude, then, that it effectuates congressional purpose to construe the intent exception to §101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion,' *Davidson v. New Orleans,* 96 U.S. 97, 104, we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return. . . ."

Since *Fleuti* was decided in 1963, there has been development as to the above-mentioned relevant factors "by the gradual process of judicial inclusion and

exclusion." In *Toon-Ming Wong v. Immigration and Naturalization Service*, 363 F.2d 234 (9th Cir. 1966), petitioner sought review of the order of Board of Immigration Appeals denying his motion to reopen deportation proceedings and permit him to apply for suspension of deportation under the provisions of §244 (a) of the Immigration and Nationality Act, 8 USC 1254(a)(Supp. 1965). On instructions of his foster father, the alien, then 16, accompanied the daughter of the foster parent to her home in Canada to assist with her children during the journey. The intention was that the alien would return to his home in the United States within a week or two, and resume his high school studies. However, because of an illness in the family, the daughter asked that the alien remain to help her, and the alien's foster father agreed. The alien remained at his foster sister's Canadian home for six months before returning to the United States. The Court concluded that the alien's minority was a relevant circumstance, and remanded the case for certain factual and legal determinations. Of particular importance, was the Court's holding that the opinion of the Board of Immigration Appeals that a six-months' absence barred relief as a matter of law was in error. The Court, at page 236, stated:

> "The length of absence is relevant, but not alone determinative."[22]

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[22]The following absences have been held not to be meaningfully interruptive of the alien's permanent residence: 2-hours, *Git Foo Wong v. Immigration and Naturalization Service*, 358 F.2d 151 (9th Cir. 1966); 5-days, *Wadman v. Immigration and Naturalization Service*, 329 F.2d 812 (9th Cir. 1964); and, 1-week, *Zimmerman v. Lehmann*, 339 F.2d 943 (7th Cir. 1965). Seventeen years has been held to be meaningfully interruptive in *Gamero v. Immigration and Naturalization Service, Los Angeles Dist.*, 367 F.2d 123 (9th Cir. 1966).

It would appear that "judicial inclusion" is increasing. In *Itzcovitz v. Selective Service Local Bd., No. 6, N.Y., N.Y.*, 447 F.2d 888 (2d Cir. 1971), a permanent resident alien sought declaratory relief to enable him to reenter the United States after a proposed business trip to Israel without being subjected to exclusion proceedings. The Court, at pages 893-94, held:

> ". . . The time factor is, to be sure, longer than in *Zimmerman, Wadman* or *Fleuti*, but it is still limited to three weeks, and is fairly characterized as only temporary. The purpose of Itzcovitz's planned trip is in a real sense for the benefit of his employer; he is not merely vacationing, as were the petitioners in the other cases just mentioned. True, he doesn't have to go, but whether he would be able to keep his job, much less advance himself, without going to Tel Aviv is doubtful. In any event, he has been directed by his employer to go. In a general sense Itzcovitz 'intends' to go to Tel Aviv, just as Fleuti intended to go to Mexico. But appellant is not in the posture of having taken the trip in disregard of the immigration consequences; rather he has here sought relief in advance. The purpose of his trip is entirely *bona fide*, honorable and lawful. He has every intention of retaining permanently his residence in the United States. And, indeed, the sole purpose of the three week trip is to qualify him for more useful employment service as he continues his permanent residence. Under these circumstances—and we consider them limited—we do not think appellant's trip to Tel Aviv will be 'meaningfully interruptive' of his permanent resi-

dence 'within the meaning and ameliorative intent of the exception to §101(a)(13).' *Rosenberg v. Fleuti, supra,* 347 U.S. at 461, 462, 83 S.Ct. at 1812."

In *Matter of Janati-Ataie,* Int. Dec. #2170 (1927), the Board of Immigration Appeals went further. In this case, the permanent resident alien, an Iranian, returned to Iran in 1965 to visit his parents and was absent from the United States for a period of 35 days; and, in 1968 he made a second trip to Iran to introduce his wife and child to his parents, and he was absent from the United States for a period of 30 days. The Board concluded that the alien did not make "an entry" into the United States after either of these visits; at page 7, it pointed to the following:

"All the cases since *Fleuti,* both before this Board and the courts, cited above and others, indicate quite clearly that no one factor is conclusive as to whether there was a meaningful interruption of the alien's legal permanent residence status, but they further indicate that most careful consideration must be given to the intent factor. The importance of the 'intent' element has been emphasized in all recent cases regarding entry.

"It is our opinion that the respondent in the instant case did not make an entry when he returned from the two trips to Iran. The length of time he was away was a reasonable minimum time in which to travel to Iran for a visit with his parents. Also, this Board has never held that the distance from the United States of the country to which the alien goes is determinative, considering the swift jet airplane travel available.

> "It is true that the respondent did have to renew his Iranian passport, but here again no one factor is controlling. His intent not to interrupt or abandon permanent residence is indicated by the following facts: That his trips were of relatively short duration, that he had both real and personal property here, that he had an established home here, that he had a permanent steady job to which he was returning, that his wife and child, both United States citizens, are living with him here, and that the purpose of his trips was to visit his parents."

However, at the request of the Commissioner of Immigration and Naturalization, the Attorney General of the United States reviewed this decision and reached the opposite conclusion. *Id.* at pages 16-19.

The Board of Immigration Appeals has even gone so far as to hold that a permanent resident alien need only be physically present in the United States for more than six months in the aggregate during a particular year for creating the inference that there is no intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. In *Matter of Hoffman-Arvayo,* Int. Dec. #2095 (1971), the alien admitted for permanent residence maintained living quarters in the United States while gainfully employed for 5 days each week and visited his family in Mexico on intermittent weekends.[23]

In the instant case, an important issue is whether daily or seasonal visits by lawful permanent resident aliens, who are employed in the United States, to their families who reside in Mexico, are departures from

[23]The Board held there was no "entry" because of the *"Fleuti"* doctrine.

the United States which can be regarded as meaningfully interruptive of the aliens' permanent residence. Applying *Fleuti* and related authority, it should be clear that permanent resident aliens who remain in the United States for at least six months, whether at one time or in the aggregate in the case of those who live in the United States during the work week, have not meaningfully interrupted their residence. For, the length of their stay abroad is not excessive; they have not left for any purpose inconsistent with the immigration laws; they do not require special travel documents; and, they intend to return to the United States. Also, regarding those aliens who live in Mexico and daily commute to the United States to work, if work is equated with residence, their departures, too, cannot be regarded as meaningfully interruptive of their permanent residence.

The court below in *Bustos*, 481 F.2d at 484, and Respondents held that "commuter" aliens are deportable because "each and every time an alien enters the United States, his entry must be legal as of that time." Since "commuter" aliens are not within the coverage of 8 USC 1101(a)(27)(b), they cannot be the beneficiaries of the informal documentary waiver provisions of 8 USC 1181(b), and their entries cannot be legal. However, this question is never reached if these aliens never make an "entry" under 8 USC 1101(a)(20) under the saving provisions of the *Fleuti* doctrine.

Conclusion.

For the above reasons, the *amici curiae* ask the Court to confirm the policy of the Petitioner in allowing lawful permanent resident aliens to equate employment with residence for the purposes of classification within the provisions of 8 USC 1101(a)(27)(b) of the Immigration and Nationality Act. The *amici* also ask the Court to confirm the past policy of the Service in allowing such aliens the informal documentary waiver provisions of 8 USC 1181(b). At the same time, however, the Court should make an order preventing the Petitioner from classifying permament residents into commuters and noncommuters for purposes of enforcing other policies, such as the labor dispute provision of 8 CFR 211.1(b)(1), which should be declared illegal.

Respectfully submitted,

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APPENDIX.

22 CFR 42.124.

§ 42.124 *Procedure in issuing visas.*

(a) *Insertion of data.* In issuing an immigrant visa the pertinent information shall be inserted in the designated blank spaces provided on Form FS-511 (Immigrant Visa and Alien Registration), in accordance with the instructions contained in this section.

(1) A symbol as specified in § 42.12 shall be used to indicate the classification of the immigrant.

(2) An immigrant visa issued to an alien subject to numerical limitations shall bear the number assigned to the immigrant. The foreign state or dependent area limitation to which the alien is chargeable shall be entered in the space provided for such entry. If the alien is chargeable to the numerical limitation prescribed in section 21(e) of the Act of October 3, 1965, the notation "Western Hemisphere" shall be entered in the space on the face of the visa for "Foreign State/Dependent Area."

(3) Immediate relative visas issued under section 201(b) and special immigrant visas issued under the provisions of section 101(a)(27) (B) through (E) of the Act may be numbered in consecutive order at each consular office, beginning a new series on July 1 of each year, if the principal consular officer considers the numbering of such visas to be desirable. In issuing such visas, no entry should be made on the visa in the space provided for the foreign state or other applicable area limitation.

(4) The date of issuance and the date of expiration of the visa shall be inserted in the proper places

on the visa and shall show the day, month, and year in that order, the name of the month being spelled out, as "24 December 1952."

(5) In the event the passport requirement has been waived under the provisions of § 42.6, a notation shall be inserted in the space provided for the passport number, setting forth the authority (section and paragraph) under which the passport was waived.

(6) A signed photograph shall be attached in the space provided on Form FS-511 by the use of a legend machine unless specific authorization has been granted by the Department to use the impression seal only.

(7) A photograph, appropriately signed, shall be attached in the space provided on Form FS-511 by the use of a legend machine unless specific authorization has been granted by the Department to use the impression seal only.

(b) *Documents comprising visa.* Form FS-511, and Form FS-510, when properly executed, together with one copy of each document required by the consular officer in accordance with § 42.111 shall constitute an immigrant visa.

(c) *Attachment of documents.* Form FS-511 shall be placed immediately above Form FS-510 and the supporting documents attached thereto. The duplicate copies of Form FS-511, Form FS-510, and supporting documents shall be retained in the files of the consular office. Any document furnished to the consular officer by the alien's sponsor or other person with a request that the contents not be divulged to the visa applicant shall, if required to the be attached to the visa, be placed in an envelope and sealed with the impression seal of the consular office, before being attached to the

visa. If an immigrant visa is issued to an alien who is in possession of a U.S. reentry permit, whether valid or expired, the consular officer shall attach the permit to the immigrant visa for appropriate disposition at the port of entry by the Immigration and Naturalization Service. Documents submitted which have no bearing on the alien's qualifications or eligibility to receive a visa may be returned to the alien or to the person furnishing them.

(d) *Signature, seal and delivery of visa.* The consular officer who issues an immigrant visa shall affix his signature, indicate his title, and impress the seal of his office on Form FS-511 in a manner which partly covers the photograph and his signature. Thereupon, the immigrant visa shall be issued by delivery to the immigrant or his authorized agent or representative.

(Sec. 221, 66 Stat. 191; 8 U.S.C. 1201) [Dept. Reg. 108.429, 25 F.R. 3255, Apr. 15, 1960, as amended by Dept. Reg. 108.480, 27 F.R. 3626, Apr. 17, 1962; Dept. Reg. 108.528, 30 F.R. 14789, Nov. 30, 1965; Dept. Reg. 108.588, 33 F.R. 9399, June 27, 1968]

8 USC 1230.

§ 1230. *Records of admission*

(a) The Attorney General shall cause to be filed, as a record of admission of each immigrant, the immigrant visa required by section 1201(e) of this title to be surrendered at the port of entry by the arriving alien to an immigration officer.

(b) The Attorney General shall cause to be filed such record of the entry into the United States of each immigrant admitted under section 1181(b) of this title and of each nonimmigrant as the Attorney General deems necessary for the enforcement of the immigration laws.

8 USC 1101(a)(15)(h).

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

8 USC 1101(a)(27)(b).

(27) The term "special immigrant" means—

(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided,* That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(14) of this title;

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

NON-QUOTA IMMIGRANTS.

Sec. 4. When used in this Act the term "non-quota immigrant" means—

Term construed.

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

Minor child or wife of resident citizen applicant.

Post, p. 157.

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

Returning from temporary visit abroad.

General Order No. 86.

U.S. Department of Labor
BUREAU OF IMMIGRATION
Washington

April 1, 1927.

55479/537
55266/General.

SUBJECT: Land border crossing procedure.

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occurred prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

C. Natives of quota countries whose original admission occurred subsequent to June 2, 1921, and prior to May 11, 1922, who at the time of

such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of one year.

D. Natives of quota countries whose original admission occurred subsequent to May 10, 1922, and prior to July 1, 1924, who at the time of such admission had resided in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, or countries of Central or South America, or adjacent islands, for a period of five years.

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

Dated this ..... day of ....., 19.....,
at .....

.....
Immigrant Inspector.

8. Identification cards held or issued to aliens of the "nonimmigrant" class shall be rubber-stamped as follows:

NONIMMIGRANT

Dated this ..... day of ....., 19.....,
at .....

.....
Immigrant Inspector.

9. To insure uniformity stamps furnished by the Bureau, only, shall be used and blank spaces, including that for signature, shall be filled in by the use of indelible pencil.

10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

11. The work of validating outstanding cards should proceed slowly, systematically, steadily and persistently, and in such a manner as to avoid confusion, congestion, interference with proper routine administration and the giving of just grounds for complaint upon the part of the traveling public

12. The status of holders of identification cards shall be inquired into periodically, preferably every six months from date stamped, where practicable, but in any event not less frequently than once a year. When inquiry has been so made, it will be evidenced by a notation to show date of such inquiry and initials of the officer upon the reverse of the card. When the holder of a "nonimmigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

/s/ George J. Harris
GEORGE J. HARRIS,
Acting Commissioner General.

APPROVED:
/s/ Robe Carl White

ROBE CARL WHITE,
Assistant Secretary.

Cases found on pages 546-552 of the case of *Transatlantica Italiana v. Elting*, 66 F.2d 542, whereby Judge Learned Hand ruled that Italian aliens were returning from a temporary absence abroad and, therefore, not excludable:

Action No. 479.

No. 2. Absent one year five months. In United States seventeen years; wife and family in Italy; went to take care of old mother; meant to bring family here; overstayed six months because of wife's sickness; owned property in New Jersey.

No. 5. Absent one year five months. In United States nine years. Took wife to Italy with him; had property and business in both countries; delayed by sickness.

No. 7. Absent one year five months. In United States fourteen years. Took wife with him to visit and was sick for year with malaria.

No. 8. Absent one year two months. In United States eighteen years. Wife in Italy; took out passport within five months, but could not get passage.

No. 15. Absent one year four months. In United States nine years. Had declared intention to become citizen. Went to get married, but sick for eleven months. Warned on visa, but one member of Board voted to admit.

No. 18. Absent two years three months. In United States eight and a half years. Wife in Italy, whom he left to marry; one member voted to admit. Stayed over to get money from bank which failed.

Action No. 480.

No. 8. Absent one year one month. In United States sixteen years with one absence of a year. Evidence that he tried to return four months earlier.

No. 29. Absent one year six months. In United States twelve years. Wife and three children in Italy. Left motorcar here. Delayed by sickness. One member of Board voted to admit.

No. 54. Absent one year three months. In United States seven years. Declared intention just before leaving. Married, delayed by sickness, trachoma not discoverable.

8 USC 1181(b).

Readmission without required documents; Attorney General's discretion

(b) Notwithstanding the provisions of section 1182 (a) (20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 CFR 211.1(b)(1).

(b) *Aliens returning to an unrelinquished lawful permanent residence*— (1) *Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card, duly issued to him: *Provided,* That during such absence he

did not travel to, in, or through any of the following places: Cuba and Communist portions of Korea or Viet-Nam, and, except for children who have not attained the age of 16 at the time they apply for admission into the United States, Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Outer Mongolia, People's Republic of China, Poland, Romania, the Soviet Zone of Germany ("German Democratic Republic"), the Union of Soviet Socialist Republics, or Yugoslavia. The foregoing restrictions shall not apply when the alien has passed in direct and continuous transit through the Soviet Zone of Germany to Berlin from West Germany by automobile, rail, or plane and returned to West Germany; or when the alien has passed in direct and continuous transit through Yugoslavia to or from Austria, Greece, or Italy. An alien regularly serving as a crewman in any capacity required for normal operations and services aboard an aircraft or vessel of American registry who is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year may, in lieu of an immigrant visa, present Form I-151, duly issued to him, notwithstanding travel to, in, or through any of the restricted places named in this subparagraph pursuant to his employment as a crewman. An alien who proceeded abroad temporarily without a reentry permit and in whose case subsequent to his departure from the United States the Department of State has approved travel to, in, or through Cuba, or Communist portions of Korea or Viet-

Nam, may, in lieu of an immigrant visa or reentry permit, present Form I-151 together with the letter from the Department of State approving his travel to, in, or through the place or places named in the letter, if he is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year. An alien who proceeded abroad temporarily without a reentry permit and in whose case subsequent to his departure from and prior to his return to the United States the Service has approved travel to, in, or through any of the other place or places named in this subparagraph for which Form I-151 is not valid may, in lieu of an immigrant visa or reentry permit, present Form I-151 together with the letter from an officer of the Service approving his travel to, in, or through the place or places named in the letter, if he is returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year. When returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad, a spouse or child of a member of the Armed Forces of the United States or of a civilian employee of the U.S. Government stationed foreign pursuant to official orders may, in lieu of an immigrant visa, present Form I-151, provided such spouse or child resided abroad while such member of the Armed Forces or such civilian employee was on overseas duty and is preceding or accompanying the member or employee, or is following to join

the member or employee in the United States within 4 months of the member's or employee's return, and during the temporary absence did not travel to, in, or through any of the restricted places named in this subparagraph, except those named places concerning which the restrictions do not apply when an alien has passed in direct and continuous transit through such areas. When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I-151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination.

APPENDIX

Cases Decided By the Board of Immigration Appeals

Case Name	Summary of Facts	Decision
Matter of Burciaga-Salcedo 11 I & N Dec. 665	Canadian lawful permanent resident commutes to employment in the United States from residence in Canada. Her employment was interrupted for more than 6 months because she had to care for a seriously ill child.	Not excludable.
Matter of Gerhard 12 I & N Dec. 556	A Canadian lawful permanent resident who was originally admitted in April of 1967 worked one week, quit his job and resumed employment in the U.S. 4 months later wanted to continue to commute from his home in Canada to his employment.	Not excludable.
Matter of Wighton 13 I & N Dec. 683	A Canadian lawful permanent resident wanted to continue to commute from his residence in Canada to his employment in the U.S. after a break in employment for approximately one year.	Excludable.
Matter of Hoffman-Arvayo 13 I & N Dec. 750	A Mexican lawful permanent resident resided and was employed in Tucson, Arizona and visited his family in Sonora, Mexico on intermittent weekends.	Not excludable.
Matter of Benavides, File No. A13 096 575 Unreported case, Los Angeles, Benjamin Myron, S.I.O. September 1, 1968	A family group of Mexican lawful permanent residents consisting of a husband, wife and son picked grapes in Delano from April to November of each year and lived in their home in Mexico from December to March.	Not excludable.

APPENDIX

Cases Decided By the Board of Immigration Appeals

On the issue of whether or not a lawful permanent resident alien was within the coverage of 8 USC 1101(a) 27(b) when the alien worked in the United States and his family lived in Canada or Mexico.

Case Name	Summary of Facts	Decision
Matter of D-C- 3 I & N Dec. 519	Canadian lawful permanent resident commuted to U.S. but never found employment.	Excludable.
Matter of L- 4 I & N Dec. 454	Canadian lawful permanent resident commuted to U.S. employment but was out of work for five months because of illness.	Not excludable.
Matter of H-O- 5 I & N Dec. 716	Mexican lawful permanent resident who lived in Mexicali and commuted to employment in Calexico.	Not excludable.
Matter of M-D-S- et al. 8 I & N Dec. 209	Three Canadian lawful permanent residents who had been unemployed in the U.S. for over six months wanted to continue to commute to their homes in Canada.	Excludable.
Matter of L- 8 I & N Dec. 643	Canadian lawful permanent resident who is employed in U.S. for 2 hours over a period of 10 months wanted to continue to commute to employment from home in Canada.	Excludable.
Matter of Bailey 11 I & N Dec. 466	A Canadian lawful permanent resident who lives and is employed full time in Canada commutes to part time self-employed work in the United States as a carpenter.	Not excludable.

Report From the Committee on the Judiciary to Accompany H.R. 981, September 11, 1973.

ADDITIONAL VIEWS OF THE HONORABLE PETER W. RODINO, JR.

I am in complete agreement with the major objectives of H.R. 981 and with one significant exception I strongly support this legislation. The 1965 amendments to the Immigration and Nationality Act abolished the national origins quota system and also imposed for the first time a numerical limitation of 120,000 on immigration from the Western Hemisphere. This limitation was added in the later stages of consideration of the 1965 legislation and it was not fully integrated into the basic design of the Immigration and Nationality Act since it failed to provide an adequate mechanism for selecting immigrants from the Western Hemisphere (i.e. preference system).

Therefore, when the Western Hemisphere ceiling took effect in July, 1968, there was an imbalance between the immigration provisions dealing with the Eastern and Western Hemisphere and this imbalance was directly attributable to the omission of a preference system for the Western Hemisphere. This omission has caused considerable hardship for citizens and lawful permanent residents of the United States as well as for many intending immigrants. The need for such a preference system has been universally recognized and the enactment of H.R. 981 will remedy this serious and unintended defect in our immigration laws.

Although this legislation will significantly advance the desirable goal of adopting uniform provisions for the Eastern and Western Hemisphere, this legislation deals very unjustly and unwisely with Canada and Mexico

by imposing a numerical limitation of 20,000 on immigration from each of these countries.

We must not fail to recognize that both Mexico and Canada stand in a relationship to us that is unique. We share common borders, we occupy the same continent. We cannot ignore these facts, even if we might wish to. It has been said that the same kind of argument was used to justify the national origins quota system which discriminated in favor of certain countries such as Great Britain, Ireland and Germany. It may well be that the same words were used, but their meaning was vastly different. The unique or special relationship which existed between us and those other countries was based on historical and sentimental considerations, combined with elements of racial prejudice. The uniqueness of our relationships with Canada and Mexico lies not merely in historical or sentimental factors, but more importantly in the practical day-to-day process of living together on the same continent.

Our dealings with Canada and Mexico are of a kind that merit the term "unique". There are reciprocal agreements concerning manufactured goods; many unions in the United States have locals in Canada; many American firms have branches in Canada and/or Mexico and many Canadians firms have branches in the United States. In addition, there are many cultural and social and other economic ties between our countries which link us together on a daily basis. Canada is our most important trading partner and we are theirs. Graduates of Canadian medical schools are eligible to seek licensure in the United States without the additional requirements that graduates of medical schools in other countries must meet.

Certainly this cooperative pattern has been mutually beneficial in promoting friendly relationships with our two contiguous neighbors. Recognizing the special relationship, the Administration in their bill, H.R. 9409, proposed separate immigration allotments of 35,000, annually for Canada and Mexico. Representatives of the Departments of State and Justice and the vast majority of public witnesses who testified before the Subcommittee on Immigration, Citizenship, and International Law supported an increased allotment of visa numbers for Canada and Mexico. However, the bill now reported by this Committee has rejected this recommendation. Instead, as I have noted, H.R. 981, as amended, imposes an annual limitation of 20,000 on immigration from all Western Hemisphere countries, similar to the present per-country limitation on Eastern Hemisphere countries.

On its face, this provision has the appearance of fairness since each country is treated in a uniform manner. While I am most sympathetic to the concept of equal treatment for all countries with respect to immigration, I feel that this equitable principle may have led us into an unfortunate situation in this particular case.

First of all, I agree that we cannot and should not attempt to solve any population or employment problems either country might have through our immigration policies nor do I believe that Canada and Mexico wish us to do so. But, it is very evident that our immigration policies are viewed in these countries as an aspect of our overall attitude toward them. Prior to 1968 there was no numerical limitation on immigration to the United States from any Western Hemisphere country. However, as a result of the 1965 legislation, all countries of this Hemisphere were subjected to the

120,000 hemispherical limitation. This limitation had a severe impact on immigration from Canada. Interestingly enough, the Canadians were aware of this development from its inception and began to launch diplomatic protests even before the ceiling became operative. Since that time the Canadians have discreetly and persistently made their objections known to our government. Mexico, on the other hand, was not adversely affected by the 1965 amendments and, in fact, has been the principal source of Western Hemisphere immigration for the past five fiscal years.

Consequently, at the present time we have a situation in which one of our neighbors has been drastically affected by existing legislation but the other one has not. H.R. 981, as amended, would have the unfortunate, dual result of failing to alleviate the adverse impact on Canadian immigration and at the same time creating a new restriction on Mexican immigration.

For example, the last annual report of the Immigration and Naturalization Service shows that during fiscal year 1972 there were 64,040 immigrants from Mexico, of whom 41,707 were subject to the Western Hemisphere numerical limitation. Enactment of the 20,000 ceiling would thus result in an immediate reduction of over 50% in lawful immigration from Mexico.

It seems to me that this drastic reduction in lawful immigration from Mexico is unsound and undesirable. In a bill designed to deal fairly with Western Hemisphere countries, it operates restrictively against our friendly neighbor, without any apparent justification. All of us are familiar with the enormous problem currently posed by illegal immigration from Mexico. In seeking to control that problem it seems essential to retain opportunities for legal immigration. Indeed, in its

Final Report of January 15, 1973, the Special Study Group on Illegal Immigration from Mexicio, appointed by the President after discussions with the President of Mexico, urged that there be no reduction in the present level of lawful immigration from Mexico. Yet H.R. 981 would accomplish an immediate reduction of over 50% in the number who could immigrate lawfully. By curtailing the opportunities for lawful immigration from Mexico, H.R. 981 would unfortunately give further impetus to the pressures for illegal immigration.

It is necessary for us to take into account also the effect of this measure on our foreign relations, particularly with Mexico. Since the actual effect of the 20,000 limitation would be a marked reduction in immigration from Mexico, the Government of that country might well regard this legislation as an affront to its people.

The difficulties that I have mentioned could be avoided by providing a separate visa allocation of 35,000 each to Canada and Mexico; or alternatively, by providing for the issuance of special visas to natives of these countries. The additional immigration that would be involved is insignificant and separate treatment for these countries can be justified because of the special relationship which exists with our neighboring countries. Through the simple expedient of increased ceilings or special visa allocations, we would demonstrate to our neighbors our awareness of their problems and our desire to deal with them in a constructive and cooperative manner. I believe that such a provision would greatly assist in promoting friendly relationships with Canada and Mexico and would certainly further our national interests.

Peter W. Rodino, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, Attorney General, et al.,
Petitioners,

vs.

ROBERT BUSTOS, et al.,

No. 73-480

CRISTOBAL CARDONA, et al.,
Petitioners,

vs.

WILLIAM B. SAXBE, Attorney General, et al.,

Amicus Curiae Brief

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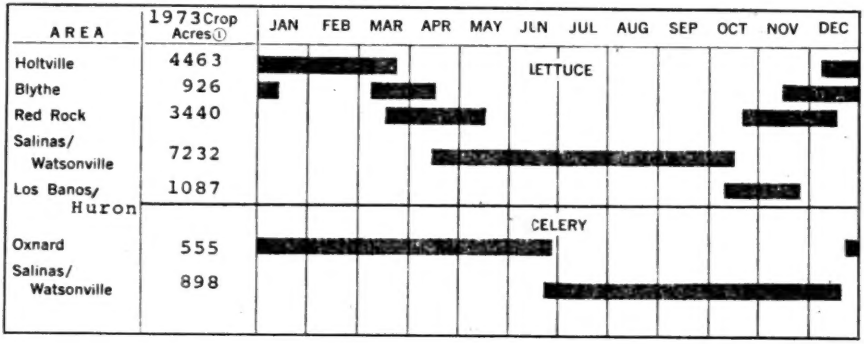
INTEREST OF AMICUS CURIAE

Bud Antle, Inc. (Antle), with its home office in Salinas, California, is one of the nation's largest growers and shippers of iceberg lettuce and celery. It farms and harvests lettuce in the Salinas-Watsonville area of Central California, Los Banos and Huron in the San Joaquin Valley of California, Blythe, California (approximately 100 miles from the Mexican border), Holtville, California in the Imperial Valley adjacent to the Mexican border, and in Red Rock, Arizona (approximately half-way between Phoenix and Tucson). It farms and ships celery from Salinas-Watsonville and Oxnard, California. It ships both products on a year-round basis to customers throughout the United States by staggering its production as follows:

HARVEST SEASONS



DESCRIPTION OF AMICUS CURIAE'S EMPLOYEES

Antle is an integrated producer with growing and harvesting operations, shops, packaging plants, vacuum cooling plants, loading facilities, trucking operations and other support activities. A substantial portion of its employees are of Mexican origin and all of its employees, except for certain executive and clerical help, are represented by various unions. Antle's field workers are represented by Local 890—General Warehousemen's and Teamsters' Union with its principal office in Salinas, California. A substantial majority of its field workers, including all of its harvest workers, have been represented by Local 890 for more than a decade.

Those employees engaged directly in farming are for the most part migratory and move from production area to production area to coincide with the harvest seasons of the company. In spite of this movement, over half of the company's 800 to 900 harvest workers work year-round for the

1. As more than one crop per year may be grown on the same acreage, the number of crop acres generally is in excess of gross land acres.

company, moving from one harvest area to another as they are needed. Many workers also work for different employers during parts of the year, possibly to avoid movement of their families. Many also take advantage of unemployment insurance provided by the company under its union contract and elect not to move with the company's field operations, or limit their moves. Thus, an employee is able to work for the company in lettuce harvesting for six months in the Salinas area and almost four months in the Holtville area, receiving unemployment insurance for the gaps between.[2] In this way, they can move their families only once during the year, settling them in the Salinas-Watsonville area for two-thirds of the year and in the Imperial Valley or neighboring Mexicali in Mexico for approximately one-third of the year.

EFFECT OF LOWER COURT OPINION ON AMICUS CURIAE'S EMPLOYEES

The opinion of District Judge Pratt in the within proceedings reached certain conclusions of fact which are not supported by the record and which are wholly inaccurate with respect to many of the workers which would be affected by the *Bustos* decision. Firstly, the statement at page 6 of the opinion (Petitioner's petition for Writ of Certiorari—page 20) that "... the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country ..." is not only unsupported by the evidence, but is demonstrably untrue, at least as it applies to Antle's operations and, we believe, agriculture in general in California and Arizona. Most large farmers in lettuce and grapes, the two industries which the respondent United Farm Workers ("UFW") is

2. Antle employees received over $400,000 in unemployment insurance benefits during 1973.

attempting to organize, have already been organized by a competing union or are already represented by the UFW. In either event, the workers' earnings are comparable to earnings in industry in general. Earnings of $10,000 per annum and more per worker are more the rule than the exception.

Secondly, Antle's field supervisors, who are intimately familiar with the personnel working under them, estimate that well over 60% of the green card harvest workers have had their cards since prior to 1965.

Thirdly, Judge Pratt's division of Green Card workers coming over from Mexico into two categories ("daily" commuters and "seasonal" commuters) is unrealistic. Antle has undertaken an extensive investigation of its own field force in an attempt to ascertain the effect of the *Bustos* Ruling on its employees. As a result, it determined that its workers in general fall into one of the following *seven* categories (percentages are company estimates):[3]

Category	Description	Est. Percentage
I.	*U.S. Citizens* (by reason of birth or naturalization)	5-10%
II.	*Year Round U.S. Residents* (green card workers who always or almost always live and sleep in the U.S.)	35-40%
III.	*Mexican Residents who Commute Daily Year Round* (green card workers who maintain a permanent home in Mexico, have a permanent job in the U.S. near the border, and who commute to work across the border daily all year round)	1%
IV.	*Mexican Residents who Commute Only Seasonally* (green card workers who maintain a permanent home in Mexico, and leave their homes and families for six months or less each year to work one or two harvest seasons in the U.S.)	5-10%

3. Paradoxically, Respondent UFW represents the employees of one of Antle's principal competitors, Interharvest, Inc., and its employees (and UFW members generally) would essentially fall into these same categories.

Category	Description	Est. Percentage
V.	*Permanent Residents of Mexico who Follow U.S. Harvest Seasons Year Round* (green card workers who maintain a permanent year-round home in Mexico, but who work year-round in the U.S. following harvest seasons. These people actually sleep in Mexico only during the El Centro and Blythe seasons)	15-20%
VI.	*Hybrid Residents* (green card workers who work year round in the U.S. following growing seasons, and who rent housing in Mexico during the southern season and rent in Salinas during the northern seasons)	30-35%
VII.	*Salinas Residents* (workers who, like hybrid residents, always live where they work, but who maintain housing year round in the Salinas area, and only rent while away from Salinas)	5-10%

Those workers who fall into categories I, II, and VII are clearly not affected by the *Bustos* decision. Those workers falling into category III have been found to be exempt by both *Bustos* and *Gooch*.[4] There are only nine workers for the company who actually fall within category III (these are tractor drivers who work year-round for the company in the Holtville-El Centro area). Categories I, II, and VII total approximately 45-50% of Antle's field work force.

The only workers who are expressly and specifically affected adversely by *Bustos* are those in category IV, the "seasonal workers". They comprise only 5-10% of Antle's work force.

Antle estimates that approximately half of its field work force, however, falls into categories V and VI. The *Bustos* decision appears to leave the status of these workers in various degrees of doubt. Particularly is this true in view of the statement by the Immigration Service in its petition for Writ of Certiorari that ". . . [i]f the seasonal commuter

4. Gooch v. Clark, 433 F 2d 74 (9th Cir. 1970), cert. denied. 402 U.S. 995, 91 S. Ct. 2170, 29 L. Ed.2d 160.

system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them re-entry for the purpose of seeking or returning to employment." Category V workers are distinguishable from category VI and category VII workers only in the fact that they own a residence or home in Mexicali. Category V, VI, and VII workers all work essentially year-round for Antle[5] and all generally move their families with them from location to location. In fact, Antle estimates that approximately 99% of its green card workers have some family; about 80% take their families with them when they move from one area to another, and at least 60% of these workers have at least one other family member working for the company. Thus, the only difference between the workers in categories V, VI, and VII is that the workers in category V would be deemed under common law principles to have a permanent residence in Mexico, the category VI workers would be deemed to have no permanent residence under common law principles or a permanent residence that moved with them from place to place[6], and the category VII workers would be deemed to have a permanent residence in Salinas.

As can be seen from the foregoing, during the period from early December through late March of each year, when Antle is engaged in harvesting operations in the Imperial Valley, approximately 50-60% of its field workers live in Mexicali and its environs on the Mexican side of the border. This percentage is substantially lower for the remainder of the year. Furthermore, after the Imperial Valley harvest is

5. Or Antle and other U.S. employers.

6. and thus the category VI workers could arguably be held to have a "permanent residence" in Mexicali during the period they live there.

completed, approximately 70% of the work force moves to Red Rock, Arizona and approximately 30% moves to Blythe. From Blythe, where temporary housing is extremely difficult to obtain, workers can commute daily to the Calexico-Mexicali area, which most do. The trip is approximately 100 miles but Antle provides transportation to Calexico for the convenience of its employees. Of the 70% of the work force which moves to Arizona, none live in Mexico to the company's knowledge, although Nogales, Mexico, is closer to Red Rock than Blythe is to Mexicali.

Categories V, VI, and VII workers are thus an anomaly: They are "daily commuters" for three to five months out of the year and "seasonal commuters" for the balance of the year, as those terms are defined in *Bustos,* yet all are essentially full time permanent employees of one American company, or are employed by several American employers year-round. Their employment in the United States is permanent although the situs of that employment is not fixed. But the category VII worker, alone among the three categories, appears to be immune from the effect of *Bustos.*

ARGUMENT

1. All Classes of Antle's Employees Were Lawfully Admitted to the United States as Resident Aliens.

The court erred in *Bustos* by premising its review of the position of green card holders upon their present "common law residence." In fact, all green card holders must be presumed to have legally received their original immigration visas. These green card holders are not before the court and it is elementary that if they came into this country as resident immigrants and established that status, they are entitled to the same Constitutional protections as any other resident alien.

2. Common Law Concepts of "Residency" Have No Relevance to Migrant Workers.

The only sin which these green card holders have visited upon America is that they, to a large extent, are migrant workers. Standard concepts of "common law residency" have no relevance when considering whether migrant green card workers lawfully admitted to the United States as resident immigrants should be denied that status for want of a "permanent residence" within the United States.

Thus, Antle's category VI workers, the "hybrid residents", are, by Judge Pratt's standards, residents of Mexico for from three to five months out of the year and residents of the United States from seven to nine months out of the year.

But in fact, the workers in categories V, VI, and VII may live side by side and work side by side throughout the year, the only difference being that the worker in category V owns a small home in Mexicali and rents the rest of the year, the worker in category VII owns a small home in Salinas and rents the rest of the year and the worker in category VI rents all year. Any distinction between one worker and the other predicated upon common law concepts of "residency" is thus totally arbitrary under the existing circumstances and discriminates against migrant workers in favor of those workers who have permanent employment at one location which, by Judge Pratt's reasoning, substitutes as his fictional "residence" when he commutes to it on a daily basis.

3. Deprivation of a Worker's Right to Return to His Employment in the United States by Reclassifying Him as an "Alien Commuter" Would Be an Unconstitutional Denial of Due Process in Violation of the Fifth Amendment of the United States Constitution.

It must go without question that if a person is admitted to this country from Mexico as a resident alien, he is fully protected by the due process clause of the Constitution. *Wong Wing v. U.S.* 163 US 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896). Recently this court in *Sugarman v. Dougall* ..... U.S. ....., 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973) held that New York's civil service law provision that only United States citizens could hold permanent positions in the competitive class of the state's civil service violated the Fourteenth Amendment's equal protection guarantee. It held likewise in *In Re Griffiths* ..... U.S. ....., 93 S. Ct. 2851 (1973) that a Connecticut statute restricting admission to the bar to citizens was a violation of the equal protection clause of the Fourteenth Amendment.

While the Fifth Amendment does not contain an "equal protection clause" as does the Fourteenth Amendment which applies only to the states, it has long been the law that ". . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884. As stated by Mr. Justice Douglas in *Schneider v. Rusk,* 377 U.S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218, 222 (1964), quoting from *Bolling v. Sharpe* supra:

> "Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"

In *Schneider,* this court struck down a federal statute which discriminated between the rights of naturalized citi-

zens v. native-born citizens to live and work abroad indefinitely.

Likewise, in *Shapiro v. Thompson* 394 U.S. 618, 642, 89 S. Ct. 1322, 1335, 22 L. Ed. 2d 600, 619 (1969) this court struck down the one-year waiting period for welfare benefits by new residents in two states and the District of Columbia. The decision against the states was founded on the equal protection clause of the Fourteenth Amendment, but Congress' exercise of federal power in the District of Columbia was held to have violated the due process clause of the Fifth Amendment, quoting from *Schneider* and *Bolling*.

In the instant proceedings, there is no question that Antle's category I employees are totally untouched by the *Bustos* decision even though many of these employees, like Antle's category V, VI, and VII employees, live in Mexico during the period of time the company's operations are adjacent to the Mexican border and have no common law permanent residence with the United States.

The discrimination which would be exercised by the Immigration Service if *Bustos* is permitted to stand is obvious: Persons lawfully admitted as resident aliens to this country would have their status revoked by reason of arbitrary and nebulous principles of "residency".[7] Resident aliens who had failed to establish permanent residences in the common law sense within the United States would be discriminated against in favor of both (a) citizens, regardless of whether they have a permanent residence and (b) resident aliens

7. Query, can a true migrant establish "residence" in a common law sense. See Stumberg, *Principles of Conflict of Laws* (3rd Ed. 1963) at page 36. If the test is subjective intent, how could the Service police such a standard?

who have established a common law permanent residence in the United States.[8]

Thus, the U.S. citizen is free to live in Mexico seven or eight months a year and work in the United States seasonally for less than six months. In so doing, he may earn enough to sustain himself at the lower cost of living in Mexico for the balance of the year. Why should a resident alien not be permitted to do the same thing? Consider the resident alien who has worked full time in the United States and established permanent residency here for a number of years and then decides to "semi-retire," moving to Mexico for part of the year and working only a part of the year in the United States. During the part of the year that he lives and works in the United States, he is as much a resident as most migrants, regardless of whether he has a permanent place of abode.

Furthermore, what difference should it make whether a person lawfully admitted as a resident alien lives in a permanent home or a trailer? Should the latter be excluded from readmission to the United States while the former is free to come and go? Is there any rational reason for discriminating in any way against permanent migrant workers of a United States employer based upon either citizenship or common law residency? Should it make a difference that

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8. In effect, it is not Congress which has imposed this arbitrary residence standard, but the Service's regulations. Congress merely defined a returning resident alien as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 USC § 1101(a)(27)(B)(1970). Thus, Congress' only requirement is (a) lawful admission for permanent residency in the first instance and (b) return from a temporary residence abroad. The regulations added the requirement that the previously lawfully admitted resident alien also be "returning to an unrelinquished lawful permanent residence in the United States . . ." 8 C.F.R. 211.1(b)(1)(1972). This added requirement discriminates against migrant resident aliens, almost all of whom are of Mexican extraction.

the migrant employer employs his employees on a year-round basis, such as Antle, or is only able to provide seasonal work? Should a resident alien duly admitted as such be required to work for Antle in all of its farming operations throughout the year or may he refrain from working during a portion of that year?

The propounding of these various questions merely exposes the difficult position in which the *Bustos* decision places migrant workers and their employers in this country. Must these workers all establish permanent residences on a year-round basis within the United States? Are they free to continue their practice of living in Mexico during the El Centro harvest season? Is year-round employment for one employer sufficient insulation to protect them from the *Bustos* decision? Must they actually work full time for one employer?

Agriculture's concern with the *Bustos* decision as it presently stands is predicated as much on the fact that these questions are unresolved as it is on the specific holdings of the decision itself.

This court has held that states cannot discriminate between aliens and citizens in their rights to pursue lawful employment. *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131; *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948). While it is conceded that Congress can control the standards for the admission of aliens and their prerequisites for naturalization, not even Congress should be permitted the right to engage in discriminatory conduct which is ". . . so unjustifiable as to be violative of due proces."[9] Any interpretation of the Immigration and Naturalization Act which would discriminate against lawfully admitted resident aliens by reason of the migratory nature of their lawful employment

9. *Bolling v. Sharpe,* Supra, 347 U.S. at 499; 74 S. Ct. at 694.

would be just such an unjustifiable discrimination. Similarly, any law, be it federal or state, which permitted citizens to engage in migratory field work without regard to whether they had a permanent residence but restricted such employment to resident aliens with a permanent residence within the United States would likewise be an unjustifiable discrimination.

Further, restricting where migrant workers may live when they are working adjacent to the Mexican border infringes dramatically upon their personal liberties, including their right to travel and their freedom of association. Their reasons for living in Mexico during those periods are to a large extent predicated on economics and the limited availability of housing in Calexico, but they are also based on the workers' desire to associate with persons of their own culture and background. We do not believe this right should be infringed. We do not believe the Constitution permits such infringement. See *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

ROBERT BUSTOS, ET AL.

No. 73-480

CRISTOBAL CARDONA, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES[1]

OPINIONS BELOW

The opinion of the court of appeals (Govt. Pet.

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[1] This Court granted cross-petitions for writs of certiorari. Because of the similarity of the underlying legal issues in the two cases, the parties agreed that the Solicitor General, in a single opening brief for the federal parties (petitioners in No. 73-300 and respondents in No. 73-480), would address the

App. 15–30)[2] is reported at 481 F. 2d 479. The district court issued no opinion.

JURISDICTION

The judgment of the court of appeals (Govt. Pet. App. 31–32) was entered on April 16, 1973. The court of appeals denied plantiffs' petition for clarification and rehearing on May 22, 1973. On July 9, 1973, the Chief Justice extended the government's time for filing a petition for a writ of certiorari to and including August 14, 1973, and the petition was filed on that date. On August 22, 1973, the Chief Justice extended plaintiffs' time for filing a petition for a writ of certiorari to and including September 20, 1973. Plaintiffs' petition was filed on September 13, 1973. Both petitions were granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether aliens who have previously been accorded the privilege of residing permanently in the United States as immigrants, but who choose to commute on a daily or seasonal basis from their homes in Canada

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issues in both cases, and that the opposing parties would file a single responsive brief also addressing the issues in both cases. For the sake of convenience, we shall refer to the federal parties as the "government" or the "Service," and to the opposing parties as the "plaintiffs."

[2] This Court has granted leave to dispense with the printing of a separate appendix in this case. References to the petitions for writs of certiorari and the appendices thereto will be in the form "Govt. Pet." or "Pl. Pet."

or Mexico to places of employment in the United States, may properly be readmitted on each entry as "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Sections 101(a), 211, and 212(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a), 1181, and 1182(a), and of 8 C.F.R. 211.1, are set forth in the appendix to this brief, *infra*, pp. 79–83.

STATEMENT

At issue in this case is whether alien "commuters" or "green-carders"—*i.e.*, aliens previously admitted for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute on a daily or seasonal basis to work in this country—are properly classified by the Immigration and Naturalization Service as "special immigrants" (8 U.S.C. 1101(a)(27)(B)) who may be readmitted on each entry without regard to numerical limitations and without the documentation otherwise required under 8 U.S.C. 1181(a). The court of appeals held that daily commuters are properly so classified but that seasonal commuters are not.

A. THE STATUTORY FRAMEWORK

The admission and exclusion of aliens[3] in the United States is governed by the Immigration and

[3] Alien "means any person not a citizen or national of the United States" (8 U.S.C. 1101(a)(3)).

Nationality Act of 1952, as amended, 8 U.S.C. 1101, *et seq.* An alien who is not excludable under 8 U.S.C. 1182 may be admitted as either an immigrant (generally one who seeks to enter the United States for permanent residence) or a nonimmigrant (one who seeks to enter on a temporary basis). The Act places numerical limitations on the issuance of immigrant visas (8 U.S.C. 1151–1153), the possession of which is ordinarily required for admission as an immigrant (8 U.S.C. 1181(a)). Most aliens seek admission as nonimmigrants, for which there are no numerical limitations. See *Gooch* v. *Clark,* 433 F. 2d 74, 78, n. 12 (C.A. 9), certiorari denied, 402 U.S. 995.

The Act, however, establishes a presumption that an alien is an immigrant: "Every alien shall be presumed to be an immigrant until he establishes * * * that he is entitled to a nonimmigrant status" (8 U.S.C. 1184(b)). And it defines "immigrant" as every alien who cannot bring himself within one of twelve enumerated classes of nonimmigrants (8 U.S.C. 1101 (a)(15)). One of the classes of nonimmigrants includes "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country" (8 U.S.C. 1101(a) (15)(H)).[4]

[4] The other classes of nonimmigrants include foreign government officials, temporary visitors for business or pleasure, aliens in transit to other countries, alien crewmen, treaty and international organization aliens, students, representatives of

An alien who does not qualify as a nonimmigrant—for example, one who seeks admission to perform temporary labor at a time when unemployed persons capable of peforming that labor *can* be found in this country—must be classified as an immigrant for purposes of admission to this country. That does not necessarily mean, however, that he would be subject to the Act's numerical limitations, for there are two classes of immigrants—"immediate relatives" of United States citizens and "special immigrants"—to whom the numerical limitations do not apply (8 U.S.C. 1151(a)).

"Special immigrant"—the only class relevant here—has five categories, including "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)). The term "lawfully admitted for permanent residence" is itself defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant * * *, such status not having changed" (8 U.S.C. 1101(a)(20)). An alien can achieve that "status" in the first instance only by complying with any applicable numerical limitations and with the Act's qualitative and documentary requirements for admission as an immigrant. Subsequent to his initial admission on that basis, however, he is free to depart the United States temporarily and to reenter without regard to numerical limitations.

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foreign information media, exchange visitors, fiances and fiancees of citizens, and intracompany transferees (8 U.S.C. 1101(a)(15)(A)-(L)).

Thus, an alien seeking to enter as an immigrant may do so without regard to numerical limitations if he has been previously "accorded the privilege of residing permanently in the United States as an immigrant," if his "status" as one possessing that privilege has not changed, and if he is "returning from a temporary visit abroad." The Act authorizes the Attorney General to readmit such an alien without requiring him to possess an immigrant visa, passport, or other formal documentation (8 U.S.C. 1181(b)).[5] The Attorney General has exercised his authority under that Section to dispense with all documentation, apart from an Alien Registration Receipt Card (Form I–151), for aliens who are returning from a temporary absence not exceeding one year (8 C.F.R. 211.1 (b)).[6]

A previously admitted returning alien is not excludable under the labor certification provisions of 8 U.S.C. 1182(a)(14). That Section makes excludable "[a]liens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified" that there are not sufficient workers in the United States to perform such labor and that employment of the aliens "will not adversely affect the

[5] The Section provides that "returning resident immigrants, defined in [8 U.S.C.] 1101(a)(27)(B) * * *, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation."

[6] The pertinent provisions of the regulation are set forth in the Appendix to this brief, *infra*, pp. 82–83.

wages and working conditions of the workers in the United States similarly employed." The exclusion is expressly applicable *only* to certain Western Hemisphere immigrants, to third and sixth preference immigrants, and to nonpreference immigrants.[7] It does not apply to "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

The government's contention in this case is that alien commuters are properly classified as "special immigrants" under 8 U.S.C. 1101(a)(27)(B)—and therefore may be readmitted without regard to numerical limitations, formal documentation, or labor certification—because in all cases they have been previously "accorded the *privilege* of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20); emphasis added). The plaintiffs argue that the commuters are not "special immigrants," because they have not in fact exercised their "privilege of residing permanently in the United States" but rather maintain residences in Mexico or Canada.

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[7] The Act establishes, with some exceptions, an annual worldwide numerical limitation on the admission of immigrants. The available immigrant visas are allocated first among those who fall within one of seven preference categories (8 U.S.C. 1153(a)(1)-(7)). Any portion of the worldwide quota that is not used by the seven preference groups is made available to other qualified immigrants in the chronological order in which they qualify (8 U.S.C. 1153(a)(8)). Aliens in this latter group are called "nonpreference immigrants."

B. THE PROCEEDINGS BELOW

1. On December 1, 1969, two California farm laborers (one an American citizen and the other a Mexican alien lawfully admitted to the United States for permanent residence) and the United Farm Workers Organizing Committee (a collective bargaining agent for farm workers) brought this suit in the United States District Court for the District of Columbia, naming as defendants the Attorney General, the Commissioner of the Immigration and Naturalization Service, and the Service's Regional Commissioner for the Southwest Region. The complaint sought a declaratory judgment and injunctive relief against the defendants' practice of readmitting alien commuters into the United States on a daily or seasonal basis as "special immigrants"—*i.e.* immigrants "lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)). Plaintiffs alleged that the commuters could not properly be classified as returning resident immigrants, that they should instead be classified as nonimmigrants under 8 U.S.C. 1101(a)(15)(H), and that under 8 C.F.R. 211.1(b)(1) they should not, in any event, be admitted to resume previous employment at places where the Secretary of Labor has determined that a labor dispute exists.

On May 13, 1970, the district court granted the motion of four Texas farm workers to intervene as

plaintiffs.[8] On June 8, 1970, the parties entered into a stipulation of facts (Govt. Pet. App. 34–37). The administrative interpretation of the immigration laws, pursuant to which the Service has historically readmitted alien commuters to the United States, is described in the following paragraph of the stipulation (*id.* at 34–35):

> 2. The defendants and their predecessors have interpreted those laws as authorizing the admission of alien commuters. Such commuters are aliens who were originally admitted as permanent resident aliens with immigrant visas but who reside in adjacent countries and come to the United States daily or at other intervals for employment. Every alien admitted as an immigrant is issued an Alien Registration Receipt Card (Form I-151). The defendants recognize such a card as evidence of the holder's lawful admission to the United States for permanent residence and his compliance with alien registration requirements, and also permit its use, under prescribed conditions, as a document entitling him to readmission to the United States as a returning resident immigrant, if he is otherwise admissible. Commuters are readmitted to resume or to seek work upon presentation of Form I-151 unless defendants find that they did not work at regular and stable employment in the United States within six months, in which event defendants consider the

[8] These intervenors are the only petitioners in No. 73–480. While both the original plaintiffs and the intervening plaintiffs are respondents in No. 73–300, no appearance has been entered and no paper has been filed in this Court on behalf of the original plaintiffs.

> alien to have lost commuter status and to be not readmissible with Form I–151.

After cross-motions for summary judgment were filed, the district court granted the government's motion, denied the plaintiffs' motions, and dismissed the action (*id.* at 33).

2. On appeal, the court of appeals held that the Service's practice of admitting *daily* commuters as "special immigrants" is proper, but that the identical practice with respect to *seasonal* commuters is contrary to the terms of the Act (*id.* at 16–30). The court traced the history of the commuter system from the 19th Century, and found that the long history of administrative practice was "known to Congress" (*id.* at 27) when it enacted the present Immigration and Nationality Act of 1952.[9] Since the Act's text and legislative history are silent on the question of commuters (*id.* at 26), "it is fair to assume that the historic daily commuter practice * * * was expected to continue unchanged in the 1952 law" (*id.* at 27.)[10]

The court held, however, that the same inference could not be drawn with respect to seasonal commuters. It held that the seasonal commuter program "is not only recent in origin, but is so patently a

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[9] The court cited S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 535–536, 616 (Govt. Pet. App. 27, n. 20).

[10] The court stated (Govt. Pet. App. 27):

> Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice, efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.

jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program [in 1964] in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (*id.* at 30). The court's impression of the seasonal commuter practice rests on its assumption that the class of seasonal commuters was "created" by the Service as "a new class" "after the termination of the bracero program in 1964" (*id.* at 20), and that there followed a "metamorphosis" (*ibid.*) by which the former braceros were simply redesignated "seasonal commuters."

The court also reasoned that the Service's practice of admitting daily commuters could be squared with the statutory language, but that its identical practice with respect to seasonal commuters could not. Thus, "the concept of permanent 'residence' can be taken to include the place of work of a daily commuter," because he may be "fully integrated into the United States economy" (*id.* at 28); but treating *seasonal* commuters as immigrants who have been "lawfully admitted for permanent residence" (8 U.S.C. 1101(a)(27)(B)) "'makes nonsense'" of the statute (Govt. Pet. App. 21). Likewise, while the court concluded that seasonal commuters should properly be classified as nonimmigrants under 8 U.S.C. 1101(a)(15)(H) because they reside in a foreign country and come temporarily to the United States to perform temporary labor (*id.* at 22–23), a daily commuter may be treated differently in the court's view because "the

services he provides are not temporary" (*id.* at 23, n. 13).

The court recognized that "perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters" and that "reversal of the present practice would cause severe dislocation and hardship" (*id.* at 28); it did not consider whether seasonal commuters would suffer similar "dislocation and hardship." The court also noted that the Secretary of State, in an affidavit filed in the district court (*id.* at 38–40), expressed the view that termination of the commuter system would "'adversely affect' our relations with our two neighbors" (*id.* at 29, n. 26); the court warned of "the strong possibility of retaliatory measures" by Canada and Mexico (*ibid.*). It construed the affidavit, however, to apply only to termination of the *daily* commuter system (*id.* at 21, n. 9); and it did not indicate whether retaliatory measures might result if only the seasonal program were stopped.

The court of appeals' decision, insofar as it held invalid the seasonal commuter program, conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Gooch* v. *Clark*, 433 F. 2d 74, certiorari denied, 402 U.S. 995, which upheld the validity of the Service's practice with respect to both daily and seasonal commuters. The government filed a petition for a writ of certiorari to review the court of appeals' judgment with respect to the seasonal commuters, urging that the conflict between the circuits should be resolved by this Court. We also acquiesced in the

granting of plaintiffs' conditional cross-petition to review the judgment below with respect to daily commuters, because of our view that the legal issues concerning the two classes of commuters are in most respects identical. This Court granted both petitions.

SUMMARY OF ARGUMENT

I

A. Commuters are properly classified as "immigrants" rather than "nonimmigrants." Plaintiffs claim that commuters must be treated as nonimmigrants under 8 U.S.C. 1101(a)(15)(H)(ii), because they have a residence in Mexico or Canada that they have "no intention of abandoning," and they enter this country "temporarily * * * to perform temporary services or labor * * *." But even assuming, contrary to the Act's design, that nonimmigrant status can be forced upon an alien who has not sought it, plaintiffs' argument overlooks the final element of the definition—namely, that "unemployed persons capable of performing such service or labor cannot be found in this country * * *." If, as plaintiffs apparently concede, such unemployed persons *can* be found in this country, then the consequence is not that the commuters cannot enter the United States but rather that they are "disqualified by the very language of the subsection" from being classified as nonimmigrants. *Gooch* v. *Clark*, 433 F. 2d 74, 77 (C.A. 9), certiorari denied, 402 U.S. 995.

Moreover, the Service has consistently refused to grant nonimmigrant status under subsection (H)(ii)

to an alien seeking entry to perform temporarily a job of a permanent character. That view of the statute has been endorsed by Congress. Since commuters come to stable employment in this country, they are disqualified for nonimmigrant status on this ground as well.

B. Since the Act defines immigrant as an alien who is not a nonimmigrant, it follows that commuters are immigrants. Moreover, they have been lawfully admitted for permanent residence in the United States. Each commuter has complied in all respects with the qualitative and documentary requirements for admission as an immigrant, and each has in fact been admitted in that status in accordance with any applicable numerical limitations.

Upon such lawful admission, the immigrant acquires "the status of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20); emphasis added). There is no requirement that he *exercise* that privilege in order to retain his status as a lawfully admitted immigrant. Thus, an alien's actual residence is immaterial to his status as having been lawfully admitted for permanent residence.

Like other immigrants with that status, the commuter may depart this country temporarily and may reenter it without regard to any numerical limitations and without the formal documentation that would otherwise be required. So long as the commuter's departure is a temporary one and is made without inten-

tion of abandoning his status as an alien lawfully admitted for permanent residence, he may be treated on reentry as "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), even if that "visit" was to his home on the other side of the border. The statute does not require that the alien be returning to an actual residence in this country.

Though 8 U.S.C. 1181(b), which authorizes reentry without formal documentation, refers to "returning resident immigrants," that phrase is followed by "as defined in section 1101(a)(27)(B) of this title." The reference to 8 U.S.C. 1101(a)(27)(B) makes clear that "returning resident immigrants" is merely a shorthand designation of "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" (*ibid.*), a class to which commuters belong. This view is consistent with the legislative history of Section 1181(b).

C. The provisions of 8 U.S.C. 1182(a)(14) exclude from admission to this country aliens seeking entry to perform skilled or unskilled labor, unless the Secretary of Labor certifies that there are not sufficient workers in the United States to perform such labor and that employment of aliens would not adversely affect the wages and working conditions of American workers. While that exclusion—changed to its present form in 1965—would apply to an alien now seeking initial entry as an immigrant, it does *not* apply to one who has *previously* been lawfully admitted for permanent

residence and who is returning from a temporary visit abroad. Thus, that section may effectively foreclose the acquisition of commuter status by an alien who does not now have it; but it does not, and was not intended to, affect the right of existing commuters to reenter as returning lawfully admitted immigrants.

II

The administrative practice of readmitting alien commuters without requiring the presentation of formal documentation has been consistently followed for 47 years. During that time, Congress was repeatedly advised of the practice and frequently acknowledged its understanding of it. Although the Act was revised several times, and although numerous unsuccessful efforts were made to change the commuter system, Congress never disapproved the administrative interpretation and indeed indicated approval of it on several occasions.

This pattern of congressional acquiescence in and approval of the commuter system amounts, we submit, to ratification of the long-standing administrative practice. Any change in the existing system must, in these circumstances, be initiated by Congress. That body alone has the institutional capacity to weigh all the complex considerations of domestic economic and labor policy that bear upon the future of the commuter program; to accommodate the conflicting interests of American workers, alien commuters, and agri-

cultural employers; and to take full account of the adverse impact upon this country's relations with Mexico and Canada which the Secretary of State believes may attend the termination of the program.

III

The seasonal commuter program is legally and historically indistinguishable from the daily commuter program, and the two must stand or fall together. The court of appeals' holding that the seasonal commuter program was created after the 1964 termination of the bracero program as an effort to circumvent the will of Congress, and its suggestion that the Service simply redesignated the former braceros as seasonal commuters, rests on fundamental misconceptions concerning the bracero and commuter programs.

The seasonal commuter system was in effect and fully available to those who could qualify long before the bracero program ended. Though many braceros became commuters as the bracero program neared its conclusion, the two classes were not identical. The commuters, unlike the braceros, were able to acquire their status only by complying with all the requirements for admission to this country as immigrants and by being lawfully admitted with the privilege of residing permanently in the United States.

Contrary to the view of the court of appeals, the present statute leaves no room for treating the two classes of commuters differently.

ARGUMENT

I

ALIEN COMMUTERS ARE PROPERLY CLASSIFIED UNDER THE 1952 ACT AS IMMIGRANTS, LAWFULLY ADMITTED FOR PERMANENT RESIDENCE IN THE UNITED STATES, WHO ARE RETURNING FROM A TEMPORARY VISIT ABROAD

Plaintiffs argue that the Service's treatment of alien commuters as "special immigrants" under 8 U.S.C. 1101(a)(27)(B) is improper, because (1) commuters are in fact "nonimmigrants," (2) they have not been "lawfully admitted for permanent residence" in this country, and (3) they are not, on reentry, "returning from a temporary visit abroad * * *." The court of appeals accepted each of these contentions with respect to seasonal commuters, but rejected each with respect to daily commuters. We submit that none of the arguments has merit with respect to either daily or seasonal commuters, and that the Service's long-standing interpretation of the Immigration and Nationality Act of 1952 is in all respects correct.

A. *Commuters Cannot Properly Be Classified as "Nonimmigrants"*

Since the Act defines "immigrant" as "every alien except an alien who is within one of the * * * classes of nonimmigrant aliens" (8 U.S.C. 1101(a)(15)), a commuter must be treated as an immigrant unless he is properly classified as a nonimmigrant. We therefore consider first plaintiffs' contention (Pl. Pet. 9–10), accepted by the court of appeals with respect to seasonal commuters (Govt. Pet. App. 22–23), that

alien commuters cannot be readmitted to this country as special immigrants because they are in fact "non-immigrants."

1. Plaintiffs rely on the language of 8 U.S.C. 1101 (a)(15)(H), which establishes the following class of nonimmigrants:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if *unemployed persons capable of performing such service or labor cannot be found in this country* * * *. [Emphasis added.]

The italicized phrase "is part of the *definition* of aliens falling within the (H)(ii) class of nonimmigrants." *Gooch* v. *Clark*, 433 F. 2d 74, 78 (C.A. 9), certiorari denied, 402 U.S. 995 (emphasis in original). If commuters could in fact bring themselves within that definition, they would be able to obtain nonimmigrant visas and enter this country without regard to the substantive and numerical restrictions on the admission of immigrants.

But plaintiffs do not argue that commuters fit the entire definition; indeed, the heart of their claim is that "unemployed persons capable of performing such labor or service" in fact *can* "be found in this country" (8 U.S.C. 1101(a)(15)(H)(ii)). Thus, plaintiffs' contention must be that commuters fit all but the final portion of the definition; they argue, however, that commuters must nevertheless be treated as nonimmigrants, and that their failure to satisfy the final part of the definition simply means that they cannot *enter* as nonimmigrants.

This is an untenable reading of the statute. It would create a new class of alien who is neither an immigrant nor yet quite a nonimmigrant. The Act, however, provides for no such state of limbo. It divides the universe of aliens into nonimmigrants and immigrants: one who is not a nonimmigrant is necessarily an immigrant, and that applies to commuters no less than to other aliens. Plaintiffs cannot have it both ways. Either commuters are within the class of nonimmigrants as defined in the Act, and are therefore free to enter the United States in that status, or they are immigrants and may enter this country, if at all, only in that status.

Thus, if, as plaintiffs implicitly suggest, unemployed laborers can be found in this country to perform the service or labor now performed by commuters (see *Gooch* v. *Clark, supra,* 433 F. 2d at 78), then the consequence is not that the commuters are nonimmigrants who are barred from entry because they are not *quite* within the statutory definition. The consequence is, rather, that the commuters must be classified as immigrants, because they are, as the Ninth Circuit held in *Gooch,* "disqualified by the very language of the subsection" from being classified as nonimmigrants (433 F. 2d at 77).

This interpretation of the statute is consistent with the legislative purpose. The H category of nonimmigrant temporary workers was created by the 1952 Act. As we show in greater detail below, Congress was well aware that commuters had been treated as immigrants under prior legislation, and the legislative history of the 1952 Act makes clear that Congress in-

tended no change in the commuter practice. Rather, as the court in *Gooch* correctly concluded, "[s]ubsection (H)(ii) * * * was intended to confer nonimmigrant status on certain aliens who were needed in the American labor force *but who, unlike commuters, would be unable to achieve admittance under immigrant status*" (433 F. 2d at 78; emphasis added).

2. There is another reason why commuters do not fall within the definition of nonimmigrant. Subsection (H)(ii) applies only to an alien who comes "temporarily to the United States to perform temporary services or labor * * *." The Service has consistently construed the subsection as not encompassing an alien who, like the commuter, comes to this country to perform a job of a permanent character, even though the period of his service is limited.[11] *Matter of Contopoulos*, 10 I&N Dec. 654; see 1 Gordon and Rosenfield, *Immigration Law and Procedure*, §2.14a(2). The Service's similar reading of an identical "temporary service" provision in former subsection (H)(i) was endorsed by Congress when it amended that

[11] The court of appeals held that, because a daily commuter works at "a steady job throughout the year," "the services he provides are not temporary" and he therefore is not within the (H)(ii) class of nonimmigrants (Govt. Pet. App. 23, n. 13). It also held, however, that "commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor" and therefore do fall within subsection (H)(ii) (*id.* at 22–23). But the seasonal commuter's job may be as "steady" as the daily commuter's; he may have regular and recurring employment throughout the entire season in which his services are needed. There is no support for the court of appeals' view that a seasonal commuter's job is of a less permanent character than that of a daily commuter.

subsection in 1970 (84 Stat. 116) to permit certain professionals to enter temporarily for the purpose of performing jobs of "a continuing or permanent nature." H. Rep. No. 91-851, 91st Cong., 2d Sess., p. 4.[12]

No change was made to the identical wording of subsection (H)(ii), but a bill (H.R. 981, 93d Cong., 1st Sess., § 2) that would make a similar change in (H)(ii) has passed the House and is pending in the Senate. In recommending approval of this measure, the House Judiciary Committee again stated that present law does not permit an alien to be treated as a nonimmigrant under (H)(ii) if his job is permanent in nature. H. Rep. No. 93-461, 93d Cong., 1st Sess., p. 16.

Commuters coming to stable employment in the United States thus cannot qualify for (H)(ii) immigrant status.[13]

3. Finally, even if a commuter satisfied the entire (H)(ii) definition of nonimmigrant, that status could not properly be forced upon him. The Act provides that "[e]very alien shall be presumed to be an im-

[12] The Committee Report stated that, "[u]nder present law, * * * an alien is not entitled to such nonimmigrant status even if coming to the United States temporarily if his employment will be in a position or occupation which is of a continuing or permanent nature. * * * This amendment [omitting "temporary" before "services"] is * * * intended * * * to lift the restriction on the temporary nature of the employment" (H. Rep. No. 91-851, 91st Cong., 2d Sess., pp. 4, 5).

[13] Even the amendment contemplated by H.R. 981 would not change the status of commuters, unless unemployed persons could not be found to perform the work done by the commuters (see pp. 19-21, *supra*).

migrant until he establishes to the satisfaction of the consular officer * * * and the immigration officers * * * that he is entitled to a nonimmigrant status under section 1101(a)(15)" (8 U.S.C. 1184(b)). Nonimmigrant status must be solicited and demonstrated by an alien, and approved by the consular and immigration authorities, or else the Act's presumption controls and he continues in the status of an immigrant. The Act does not contemplate that nonimmigrant status will be imposed upon any person who has not applied for it.[14]

Before an alien can be classified as a nonimmigrant under subsection (H)(ii), his prospective employer must submit a petition on his behalf under 8 U.S.C. 1184(c). If that petition is approved by the Service, the alien himself must then apply for nonimmigrant status and demonstrate to the American consul and the Service that he in fact qualifies for such status. See 1 Gordon and Rosenfield, *Immigration Law and Procedure,* § 2.14b. Unless a commuter seeks and obtains nonimmigrant status in accordance with these procedures, he may not be regarded as a nonimmigrant even if the (H)(ii) category might otherwise be available to him.

[14] The status of a resident alien may be adjusted on a compulsory basis from immigrant to nonimmigrant in certain limited circumstances (8 U.S.C. 1257(a)), but even then the alien may retain immigrant status if he waives all rights to which he would be entitled as a nonimmigrant (8 U.S.C. 1257(b)).

B. *Commuters Are Properly Treated Under the 1952 Act As Duly Admitted Immigrants Returning From a Temporary Visit Abroad*

If, as we have shown, alien commuters are not "non-immigrants," they must be classified as immigrants (8 U.S.C. 1101(a)(15)). The remaining question is whether they may properly be treated as "special immigrants" under 8 U.S.C. 1101(a)(27)(B). If so, they may be readmitted without regard to the Act's numerical limitations (8 U.S.C. 1151(a)) and without the formal documentation that would otherwise be required of immigrants (8 U.S.C. 1181(b)).

1. The commuter has been "lawfully admitted for permanent residence"; the statute does not require that he establish an actual residence in this country.

A "special immigrant" under the Act includes "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)). Plaintiffs contend (Pl. Pet. 10–11), and the court of appeals held with respect to seasonal commuters (Govt. Pet. App. 21), that commuters do not fit this definition because they are not "lawfully admitted for permanent residence." Underlying both plaintiffs' contention and the court's holding is the erroneous assumption that, to retain the status of an immigrant "lawfully admitted for permanent residence," an alien must establish an actual residence in the United States.

"Lawfully admitted for permanent residence" is itself a term of art. It is defined by the Act as "the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an im-

migrant in accordance with the immigration laws, such status not having changed" (8 U.S.C. 1101(a)(20); emphasis added). We have emphasized the words "status" and "privilege" because in our view they are fundamental to an understanding of the statutory scheme. Upon lawful admission as an immigrant, an alien acquires a *status* which gives him the *privilege* of residing permanently in the United States. So long as that status is not changed, the alien who has been lawfully admitted for permanent residence retains the privilege of establishing a permanent residence in this country.[15] However, there is nothing in this definition, or in any other provision of the statute, that conditions the grant of lawful immigrant status on the establishment of an actual residence in the United States.

Plaintiffs argue that the commuters' "status has changed because they have not assumed residence in the United States" (Pl. Pet. 11). But, as the Ninth Circuit correctly observed in *Gooch* v. *Clark, supra,* 433 F. 2d at 79, the reservation in 8 U.S.C. 1101(a)(20) concerning "such status not having changed" refers primarily to the change of status from that of an immigrant lawfully admitted for permanent residence to that of a nonimmigrant, pursuant to 8 U.S.C 1257. See *Matter of S.,* 6 I&N Dec. 392 (Attor-

[15] Since the commuter's status is tied to continued employment in this country, it has been the administrative view that such status is lost if the commuter is out of such employment for a period of six months, unless the unemployment was caused by uncontrollable circumstances, such as serious illness, disabling injury, or pregnancy. *Matter of D.C.*, 3 I&N Dec. 519; *Matter of L.*, 4 I&N Dec. 454 (1951); *Matter of Burciaga-Salcedo*, 11 I&N Dec. 665 (1966); *Matter of M.D.S.*, 8 I&N Dec. 209; *Matter of Wighton*, 13 I&N Dec. 683.

ney General); *Matter of M.P.*, 9 I&N Dec. 747. Lawful residence status may also be lost if the returning immigrant reenters surreptitiously. *Matter of M.*, 5 I&N Dec. 642. And an alien with lawful residence status may be refused readmission if his reentry is barred on a substantive ground specified in the statute. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Karpay* v. *Uhl*, 70 F.2d 792 (C.A. 2). But there is no basis in the statutory language or purpose for an assumption that status as an immigrant lawfully admitted for permanent residence is lost or abandoned by failure to establish a home in the United States.

A person wishing to acquire 'the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant" (8 U.S.C. 1101(a)(20)), must satisfy any applicable numerical restrictions on the entry of immigrants (8 U.S.C. 1151(a)). He must also comply with comprehensive qualitative requirements such as those relating to health, morals, and economic status (8 U.S.C. 1182). And he must obtain an immigrant visa, after satisfying an American consul that he has complied with the prescribed numerical and qualitative restrictions (8 U.S.C. 1181(a), 1201). In his application for an immigrant visa, the prospective immigrant must state "whether or not he intends to remain in the United States permanently" (8 U.S.C. 1202(a)). But the statute does not declare or imply that he cannot be granted lawful status as an immigrant if he does *not* intend to reside permanently in the United States; nor does it provide that one who has been law-

fully admitted as an immigrant will lose that status if he does not remain in the United States permanently or if he does not establish a permanent residence in the United States.

Having complied with the numerical restrictions and substantive requirements of the Act, having obtained an immigrant visa from an American consul, and having been lawfully admitted to the United States as an immigrant, the alien acquires a status that entitles him to several significant benefits. He may remain in the United States indefinitely; he is free to work in this country; he may return to this country after a temporary absence abroad; and he has the privilege of establishing a permanent residence in the United States. These benefits have been available to alien commuters since the inception of the commuter program in 1927.

What plaintiffs and the court of appeals have overlooked is that the commuter, whether daily *or* seasonal, has acquired, in accordance with all the statutory requirements, the *status* of an immigrant, with the attendant *privilege* of establishing a permanent residence in the United States. That status, together with the privilege, is retained unless it is abandoned or forfeited in the manner prescribed by law. As the Ninth Circuit correctly held in *Gooch, supra,* 433 F. 2d at 79:

> [T]he definition [of "lawfully admitted for permanent residence"] refers not to the actuality of one's residence but to one's *status* under the immigration laws. Commuters have been accorded the privilege of residing permanently in

> the United States * * *. Their disinclination to exercise that privilege is of no moment.

The court of appeals in this case, persuaded by the dissenting opinion in *Gooch*, 433 F. 2d at 83–85, concluded that the Service's reading of "lawfully admitted for permanent residence" might produce incongruities if applied to other sections of the Act (Govt. Pet. App. 21).[16] We acknowledge that the commuter enjoys a unique status, and we read the statute in the context of that status, deeply rooted in long administrative practice (see pp. 39–47, *infra*), sanctioned and ratified by Congress as embodying the legislative will (see pp. 47–63, *infra*).

Whether the statutory phrase must be read to include commuters in contexts other than the commuter's status for purposes of readmission to the United States has not been presented to the Service and need not be resolved in this case. The interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections. It is enough to say in the context of this case that the Service's treatment of commuters on reentry to this country is fully consistent with the statutory language and the congressional will.

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[16] The dissenter in *Gooch* argued that, if "lawfully admitted for permanent residence" covers alien commuters in the context of 8 U.S.C. 1101(a)(27)(B), so that they may be readmitted without regard to numerical limitations and formal documentation, then the phrase must be read similarly in all its other contexts, including provisions granting special preferences for admission, waivers of exclusion, and immunity from deportation for relatives of aliens lawfully admitted for permanent residence. The dissenting judge believed that to read these provisions as covering commuters "makes nonsense of the congressional policy" (433 F. 2d at 83).

2. *As immigrants lawfully admitted for permanent residence, alien commuters are entitled to reenter this country after a temporary absence.*

a. Plaintiffs argue (Pl. Pet. 11) that commuters may not be treated as special immigrants because they are not "returning from a temporary visit abroad" within the meaning of 8 U.S.C. 1101(a)(27)(B). They claim that, since the commuter's home is in Mexico, "his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico" (*ibid.*).

But, for an alien who has been lawfully admitted to this country as an immigrant, a return "from a temporary visit abroad" means only that the absence from this country must have been a temporary one and that the alien departed without any intention of abandoning his status as an alien lawfully admitted for permanent residence. The statutory requirement is satisfied if "the intention of the departing immigrant [is] * * * to return within a period relatively short, fixed by some early event." *United States ex rel. Lesto* v. *Day*, 21 F.2d 307, 308–309 (C.A.2).

Without such an intention to return, the visit abroad could not be characterized as temporary, and the alien's intention to abandon lawful residence status in this country would be established. *Gamero* v. *Immigration and Naturalization Service*, 367 F. 2d 123 (C.A. 9); *United States ex rel. Katnic* v. *Reimer*, 25 F. Supp. 925 (S.D. N.Y.), affirmed *per curiam*, 104 F. 2d 1022 (C.A. 2). Conversely, if the departing immigrant intends to return to the United States within

a "relatively short" time, his visit abroad is temporary, and his intention to retain lawful residence status is confirmed. Contrary to plaintiffs' suggestion, the statute does not require that the immigrant must be departing from or returning to a residence in the United States.[7]

b. A related contention (Pl. Pet. 10) is that commuters may not reenter without a valid immigrant visa in each case, because under 8 U.S.C. 1181(b) only "returning resident immigrants" can be excepted from the formal documentation requirements of 8 U.S.C. 1181(a). Plaintiffs rely on the Act's definition of "residence" as "the place of general abode," which in turn is defined as a person's "principal, actual dwelling place in fact, without regard to intent" (8 U.S.C. 1101(a)(33)).

This argument, however, ignores both the clear language of the statute and the history and purpose of Section 1181(b). That section gives the Attorney General authority to excuse from the formal documentation requirements, "returning resident immigrants, *defined in section 1101(a)(27)(B) of this title*" (emphasis added). The italicized reference is to the definition of "special immigrant" as one who has been "lawfully admitted for permanent residence, who is returning from a temporary visit abroad." The phrase "returning resident immigrants" is thus no more than

[7] We note that all members of the Ninth Circuit panel in *Gooch* v. *Clark*, *supra*, including the dissenting judge, agreed that a commuter's absence from the United States is a "temporary visit abroad" within the meaning of the Act (433 F. 2d at 79–80, 82, n. 1).

a shorthand device to designate, without repeating the entire statutory language, the class of immigrants defined precisely by Section 1101(a)(27)(B). There is no reason to think that the language used as shorthand was calculated in any way to constrict the class defined in Section 1101(a)(27)(B). Since, as we have demonstrated, commuters are within that class, the phrase "returning resident immigrants" cannot be read to exclude them.

The statutory definition of "residence" is thus beside the point. A "returning resident immigrant" is one "lawfully admitted for permanent residence," and the latter phrase, as we have shown, includes any alien who has been granted the privilege of residing permanently in this country, regardless of whether he has chosen to exercise the privilege.[18] We therefore

[18] The definition of residence as "place of general abode" and "principal, actual dwelling place in fact" (8 U.S.C. 1101(a)(33)) was derived from Section 104 of the Nationality Act of 1940, 54 Stat. 1138, and is still primarily relevant to the nationality portion of the Immigration and Nationality Act of 1952. Thus, an applicant for naturalization must establish *both* that he was lawfully admitted for permanent residence *and* that he "has resided continuously * * * within the United States" for specified periods thereafter (8 U.S.C. 1427(a)). Residency requirements appear elsewhere in the nationality sections of the Act. See, *e.g.*, 8 U.S.C. 1401 (a) (acquisition of citizenship at birth outside the United States); 8 U.S.C. 1421 (jurisdiction of naturalization courts dependent on residence of petitioner). The statutory definition of residence would be relevant to a commuter if he petitioned for naturalization, because he might be unable to satisfy the requirement of continuous residence after his lawful admission as an immigrant. See *In re Barron*, 26 F. 2d 106 (E.D. Mich.); *Petition of Wright*, 42 F. Supp. 306 (E.D. Mich); *Petition of Correa*, 79 F. Supp. 265 (W.D. Tex.).

need not rely on, though we do not necessarily reject, the court of appeals' view that "the concept of permanent 'residence' can be taken to include the place of work of a daily commuter" (Govt. Pet. App. 28).[19] The commuter may properly be readmitted without formal documentation regardless of whether his place of work may constitute his "residence"; what matters is his status as one who has been accorded the privilege of permanent residence, not his residence in fact.

This reading of Section 1181(b) is consistent with its history and purpose. The immigrant visa requirement was originally established by the Immigration Act of 1924. Section 13(b) of that Act, 43 Stat. 162, authorized waiver of the visa requirement for "immigrants who have been legally admitted to the United States and who depart therefrom temporarily." The contemporaneous administrative interpretation of that provision was that it applied to the commuter, since he had been "legally admitted" to this country and had "depart[ed] therefrom temporarily" (see pp. 42–43, *infra*). The commuter would otherwise have been required to obtain an immigrant visa for each reentry, a practical impossibility. His regular passage across the frontier was made possible under the 1924 Act by permitting him to use the border crossing identification card as evidence of his lawful residence status. The use of the border crossing identification card for this

[19] In our view, however, a seasonal commuter is not differently situated in this respect from a daily commuter. The former, no less than the latter, "has a permanent commitment and interest in the on-going vitality" of the community where he works and is "often fully integrated into the United States economy" (Govt. Pet. App. 28).

purpose was ratified by Congress in the comprehensive statutory revisions of 1940 and 1952 (see pp. 49–55), *infra*).

In its original form, Section 211(b) of the Immigration and Nationality Act of 1952, 66 Stat. 181, 8 U.S.C. 1181(b), authorized waiver of the normal documentary requirements for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." This language was similar to that in the 1924 Act and obviously was designed to conform with the interpretation of the prior statute. After enactment of the 1952 Act, the Alien Registration Receipt Card, Form I–151, was designated as the resident alien's border crossing card (8 C.F.R. 211.11 (1952 rev.)), and it has been used for that purpose since then. This is the so-called "green card," [29] which evidences the holder's status as an alien lawfully admitted for permanent residence, and which is used by the commuter as the prescribed reentry document.

The language of the original Section 1181(b) was changed to its present form in 1965 (P.L. 89–236, 79 Stat. 917), when far-reaching revisions in the immigration quota system were enacted. The legislative history of the 1965 Act contains no suggestion of an intention to make any change in the alien commuter system. It seems clear that the substitution of "returning resident immigrants, defined in section 1101(a)(27)(B)" for the earlier "aliens lawfully admitted for permanent residence who depart from the United

[29] This colloquial designation persists, although the card's color has been changed to blue in recent years.

States temporarily" was one of the "numerous technical and minor changes" made by the 1965 Act. See S. Rep. No. 748, 89th Cong., 1st Sess., p. 10. The 1965 revision of Section 1181, particularly in regard to subsection (a), was designed in part to conform to the changes made in the Act's quota system and the creation of the new category of "special immigrants." See *id.* at 23. In addition, as the House Committee observed, the language of Section 1181(b) was "restated and amended to ***broaden*** the authority of the Attorney General to waive documentation of a returning resident alien." H. Rep. No. 745, 89th Cong., 1st Sess., p. 21 (emphasis added).

It is clear that no major change in direction was contemplated by the 1965 revision of Section 1181(b). At most, it appears to have represented an effort to simplify and clarify the language of the statute. As the Ninth Circuit correctly held in *Gooch* v. *Clark, supra,* 433 F. 2d at 80, it cannot be concluded "from a minor and obscure change in the language of Section 1181(b) that Congress intended to end a well-known practice of the Service of more than 38 years, thereby grossly affecting some 40,000 commuters, their families, and their employers." [21]

c. Plaintiffs have yet another argument concerning the documentation required of reentering commuters.

[21] In arguing that Congress intended in 1965 to terminate the commuter program, plaintiffs rely on a single exchange between the Service's General Counsel and a legislative assistant for the House subcommittee, which occurred during hearings held two years earlier (Pl. Pet. 14–16). We show later in this brief (pp. 56–58, *infra*) that this "obscure colloquy" (*Gooch* v. *Clark, supra,* 433 F. 2d at 80) does not support plantiffs' contention.

They claim (Pl. Pet. 11–12) that the regulation authorizing, pursuant to 8 U.S.C. 1181(b), the use of Form I–151 (the "green card") as a reentry document by "an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)), cannot be applied to commuters because they have no "unrelinquished lawful permanent residence" in this country.

This contention is insubstantial. The regulation was issued pursuant to 8 U.S.C. 1181(b) and must obviously be read in conformity with that section of the statute. While the regulation could be more artfully drafted, the phrase "unrelinquished lawful permanent residence" is meant to signify the unrelinquished *status* of an alien who has been granted the privilege of residing permanently in the United States. That is the statutory definition, and there is no reason to think that the regulation was calculated to apply to a narrower class than the statute authorizes.

It has been a matter of universal knowledge that for 47 years the Service has authorized the use of Form I–151, and its predecessor border crossing card, as an entry document for commuters. The Service has always regarded the commuter as returning to an unrelinquished permanent residence status in the United States, and it has properly construed its own regulation in harmony with that view. Moreover, the last sentence of 8 C.F.R. 211.1(b)(1)—barring use of Form I–151 by an alien entering to accept new employment at a "place where the Secretary of Labor has determined that a labor dispute exists"—was intended

to limit an employer's use of commuters as strike-breakers. See *Sam Andrews' Sons* v. *Mitchell*, 457 F. 2d 745 (C.A. 9); *Cermeno-Cerna* v. *Farrell*, 291 F. Supp. 521 (C.D. Cal.), vacated in part and remanded *sub nom. Giumarra Vineyards Corporation* v. *Farrell*, 431 F. 2d 923 (C.A. 9).[22] That confirms the Service's interpretation that the entire subsection applies to commuters.

In these circumstances, particularly in the light of the long and consistent practice, there is no reason to reject the Service's interpretation of its own regulation. It is unmistakably clear that the regulation was not designed, and has never been applied, to preclude the entry of commuters.

C. *The Labor Certification Requirements of the Act Are Inapplicable to Those Who Have Achieved Commuter Status*

Another aspect of plaintiffs' argument is that the commuter status is inconsistent with, or subordinate to, the labor certification requirements of 8 U.S.C. 1182(a)(14), particularly since the amendment of that section in 1965. In its original form in the 1952 Act, the section excluded from admission to the United

[22] In the district court and the court of appeals, plaintiffs argued that the regulation should be read to preclude the entry of a commuter to work at a place where a labor dispute exists, even if the commuter has previously been employed there and would merely continue an existing employment relationship (see Govt. Pet. App. 17). The court of appeals did not reach the issue, and plaintiffs' petition does not present it for review in this Court. We note that this aspect of 8 C.F.R. 211.1(b)(1) was declared invalid by the Ninth Circuit in *Sam Andrews' Sons* v. *Mitchell*, *supra*.

States aliens seeking entrance "for the purpose of performing skilled or unskilled labor" if the Secretary of Labor certified that United States residents were available to perform such labor and that employment of aliens would adversely affect the wages and working conditions of workers in the United States similarly employed. The exclusion thus came into effect only if invoked by the Secretary of Labor. As amended in 1965, the exclusion applies *unless* the Secretary certifies that there are *not* sufficient United States workers and that employment of aliens would *not* adversely affect wages and working conditions in this country.

It is undoubtedly true that the labor certification requirement was fashioned as a protection for American labor. But Section 1182(a)(14), in both its original and its amended form, has never been applicable to all immigrants, or even to all immigrants who come to perform labor. Under its terms, the statute applies only to certain Western Hemisphere special immigrants, to immigrants in the third and sixth preferences (which relate to occupational skills), and to nonpreference immigrants. Not included in the groups specified in Section 1182(a)(14), and thus not subject to its proscription, are aliens lawfully admitted for permanent residence returning from a temporary visit abroad, and certain close relatives of American citizens and of resident aliens. See 1 Gordon and Rosenfield, *Immigration Law and Procedure*, § 2.40.

Upon his initial entry into the United States as an immigrant, the alien commuter must comply with all applicable requirements of the immigration laws, *in-*

cluding the labor certification requirement. Consequently, all aliens who have sought to establish commuter status after the effective date of the 1965 amendments, or who now seek to establish such status, can do so only upon a proper certification by the Secretary of Labor (unless they are excepted as close relatives of American citizens or of lawful resident aliens). But once he has acquired the status of an alien lawfully admitted for permanent residence, the commuter is no longer subject to the labor certification requirement when he reenters. The restrictions of Section 1182(a)(14) are inapplicable to him, because he is readmitted as an immigrant, lawfully admitted to the United States for permanent residence, who is returning from a temporary visit abroad.[23]

The Senate Committee Report on the 1965 Act declared that a major aim of the statute was "to protect the American labor market from an influx of * * * foreign labor." S. Rep. No. 748, 89th Cong., 1st Sess.,

[23] In *Amalgamated Meat Cutters and Butcher Workers* v. *Rogers*, 186 F. Supp. 114 (D. D.C.), the court held that aliens lawfully admitted for permanent residence are not affected by the labor certification provisions. It also held, incorrectly in our view, that commuters are not lawfully admitted for permanent residence because they do not actually reside here. It therefore ruled that commuters *would* be affected by the provisions of former Section 1182(a)(14). The case became moot before a final order could be entered or an appeal could be perfected. As recounted in the majority's opinion in *Gooch* v. *Clark*, *supra*, 433 F. 2d at 81, the Service disagreed with the *Amalgamated* decision, declined to follow it, and made known to Congress its opposition to the decision. The court in *Gooch* concluded that *Amalgamated* "was wrongly decided," and it could "find no evidence that Congress intended to adopt the decision in its 1965 amendments to the Act" (*id.* at 82).

p. 15. Similar views were expressed when Section 1182 (a)(14) was originally enacted in 1952. See H. Rep. No 1365, 82d Cong., 2d Sess., p. 51; S. Rep. No. 1137, 82d Cong., 2d Sess., p. 11. As the language of the 1965 report implies, the underlying statutory purpose was to limit *new* admissions of alien laborers, not to foreclose the readmission of aliens already in the labor market who are returning to stable employment in this country. It is one thing to prevent an *influx* of foreign labor; it would be quite another to strip thousands of previously admitted commuting immigrants of their existing jobs. Congress clearly intended the former, but, contrary to plaintiffs' suggestion, there is no evidence that it intended the latter as well.

II

CONGRESS HAS BEEN AWARE OF, AND IN EFFECT HAS RATIFIED, THE LONG-STANDING ADMINISTRATIVE PRACTICE WITH RESPECT TO THE READMISSION OF ALIEN COMMUTERS

We have shown that alien commuters are properly readmitted to this country as special immigrants under the 1952 Act. That interpretation of the Act is fortified, we submit, by the 47 years of consistent administrative practice with respect to commuters, which has repeatedly been brought to the attention of Congress and which Congress has repeatedly approved and declined to change.

A. *The Administrative Practice of Admitting Commuters Without Formal Documentation Has Been Consistently Followed for 47 Years and Is Entitled*

to Great Weight in Ascertaining the Congressional Intent

1. The historical development of the alien commuter system has been the subject of numerous studies.[24] Ease of border crossing, including passage to jobs on both sides of the frontier, was an established practice in the 19th Century and the early years of the 20th Century (Western Hemisphere Report, p. 101). Indeed, the immigration statutes of that period directed the administrative authorities to prescribe rules that would facilitate travel to the United States from Canada and Mexico (Act of Feb. 5, 1917, § 23, 39 Stat. 874, 892; Act of Feb. 20, 1907, § 22, 34 Stat. 898, 905–906).

Pursuant to those directives, the immigration authorities prescribed an identification card for the use of "aliens and citizens who, residing on either side of the line, habitually cross and recross the border upon legitimate pursuits" (Immigration Rules of May 1, 1917, Rule 12, subd. 9, and Rule 13, subd. 3; Immigration Rules of July 1, 1925, Rule 3, subd. R; Immigration Rules of March 1, 1927, Rule 3, subd. Q). Since there were no numerical restrictions before 1921 on entry into the United States, aliens in Canada

[24] See, *e.g.*, Report of the Select Commission on Western Hemisphere Immigration, p. 101 (1968) (hereinafter "Western Hemisphere Report"); Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 Stanford L. Rev. 1750 (1969); Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U. L. Rev. 439 (1973).

or Mexico could obtain such identification cards and freely cross the border to come to jobs in this country unless they were barred by some qualitative ground of exclusion.

Numerical restrictions on immigration were imposed for the first time by the Act of May 19, 1921, 42 Stat. 5. The Act did not, however, have any significant impact on entries from Canada and Mexico, because Section 2(a) of the Act exempted from its restrictions aliens who had previously resided in those two countries for one year.[25]

The temporary quota law of 1921 was succeeded by the Immigration Act of 1924, 43 Stat. 153, which introduced a number of new directives relevant to the traditional border traffic.[26] First, it classified all arriving aliens as either immigrants or nonimmigrants. An immigrant was defined as any alien coming to the United States except one within six enumerated nonimmigrant classes (Sec. 3, 43 Stat. 154). Second, it established quota limitations on the admission of immigrants based on national origin. Among the groups exempted from the quota limitations, and designated as "nonquota" immigrants, were natives of Western Hemisphere countries and "immigrant[s] previously lawfully admitted to the United States and returning from a temporary visit abroad" (Secs. 4, 5, and 11, 43 Stat. 155, 159). Third, the Act precluded the entry

[25] The Act of May 11, 1922, 42 Stat. 540, enlarged the requisite period of residence to 5 years.

[26] The 1924 Act did not repeal the basic 1917 Immigration Act, but imposed numerical and documentary restrictions in addition to the substantive restrictions established in the 1917 Act. Sec. 25, Immigration Act of 1924, 43 Stat. 166.

of an immigrant unless he had an immigration visa; but again it authorized exemption from this requirement of "immigrants who have been legally admitted to the United States and who depart therefrom temporarily" (Sec. 13(a) and (b), 43 Stat. 161–162).

When the 1924 Act became effective, the immigration authorities initially classified as nonimmigrant visitors for business under Section 3(2) of that Act, 43 Stat. 154, the alien commuters coming from Canada and Mexico to work in the United States. By virtue of that classification, the commuters were enabled to continue entering the United States freely, usually in possession of the border identification card sanctioned by the procedures which had previously been adopted. On further consideration, however, the administrative authorities reversed their position, and on April 1, 1927, the Acting Commissioner General of Immigration issued General Order No. 86,[27] in which the changed administrative interpretation was articulated.

The General Order specified that thereafter aliens residing in foreign contiguous countries who entered the United States to engage in or to seek employment would no longer be regarded as nonimmigrants but would be considered "immigrants" and would have to attain admission under that status. Those who achieved such admission would be permitted to enjoy the border crossing privilege to go to their employment and would be able to obtain border crossing identification cards identifying them as immigrants. Such aliens

[27] The relevant portions of General Order No. 86 are set forth in the Appendix to this brief, *infra*, pp. 83–84.

"will be considered as having entered for permanent residence" (App., *infra*, p. 84).

The change of interpretation reflected in General Order No. 86 generated protests and litigation. The protests included expressions of concern by the Canadian Government. In one of a series of diplomatic exchanges the Canadian Minister to Washington wrote to the Secretary of State on June 8, 1927:

> For many years there has been reciprocal free movement over the border between the United States and Canada, a movement freer and involving a larger number of people than that between any other two countries in the world. This freedom of movement has been an outstanding demonstration of the close connection and friendship existing between the people of the two countries. The boundary is of such a character that the communities situated close to it on both sides must have many common interests. In some of these border communities the relationship has been so intimate that residents on one side of the frontier have been in the habit of crossing daily to the other side to engage in employment. This practice, as you are aware, is of many years standing * * *. The practice rooted in this understanding and in the unique conditions of border intercourse on this Continent has continued to this day. It has been most marked in the area adjacent to Windsor and Detroit and in the Niagara region. Though a large majority of the individuals who so cross the border daily are Canadians entering the United States, the practice is reciprocal, and a considerable number of citizens of the United States come to Canada each working day. * * * [Foreign Relations of the United States, 1927, Vol. 1, p. 503.]

Eventually, the United States assured Canada that a successful effort had been made to facilitate retention of the commuter status by th se previously enjoying it (*id.* at 510).

This Court subsequently ruled that an alien coming to perform labor was properly classified as an immigrant and not as a nonimmigrant visitor for business, and that "the departmental regulation [General Order No. 86] * * * is in accordance with the Congressional intent." *Karnuth* v. *United States ex rel. Albro,* 279 U.S. 231, 244.

2. The administrative practice sanctioning the entry of alien commuters was inaugurated by General Order No. 86 in 1927. The chief impact of that regulation was to curtail the entry of Europeans domiciled in Canada and Mexico, who could not readily qualify as immigrants because of the quota limitations established by the 1924 Act. (In this class were the unsuccessful litigants in *Albro.*) For natives of Canada and Mexico, the commuter system established by General Order No. 86 posed no substantial difficulty. As natives of the Western Hemisphere, they were exempt from quota limitations, and it was a simple matter for them to conform to the requirements of General Order No. 86 by entering the United States with nonquota immigration visas in conformity with law, obtaining a border crossing identification card as immigrants, and thereafter returning regularly to their jobs in the United States.

In the ensuing years, alien commuters continued to enter on the basis of the administrative interpretation and practice first enunciated in General Order No. 86. The regulation was codified, without substantial change, in 1930 and was carried forward in subsequent revisions of the regulations before 1952.[28] The alien commuter practice also was reviewed and endorsed by published administrative decisions. *Matter of D.C.*, 3 I&N Dec. 519 (1949); *Matter of L.*, 4 I&N Dec. 454 (1951).[29]

3. The alien commuter practice was again evaluated by the administrative authorities following enactment of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, *et seq.*, a comprehensive recodification of the immigration and nationality laws. Responding to suggestions that the 1952 Act had somehow eliminated the alien commuter, the Board of Immigration Appeals reaffirmed the continuing vitality of the commuter practice. *Matter of H.O.*, 5 I&N Dec. 716 (1954). In that decision, the Board comprehensively reviewed the development and maintenance of the alien commuter program, discussed the legislative history and structure of the 1952 Act, and found that Congress was aware of the alien commuter practice and had no intention of disturbing it.

In a series of published decisions, the administrative authorities thereafter repeatedly reaffirmed their

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[28] Immigration Rules of Jan. 1, 1930, Rule 3, subd. c; 8 C.F.R. 3.6 (First ed., 1939); 8 C.F.R. 110.6 (1947 rev.)

[29] An editor's note (4 I&N at p. 456) also cited a previous unreported decision to the same effect in 1946, approved by the Attorney General in 1947.

adherence to the alien commuter concept. *Matter of M.D.S.*, 8 I&N Dec. 209; *Matter of Bailey*, 11 I&N Dec. 466; *Matter of Burciaga-Salcedo*, 11 I&N Dec. 665; *Matter of Smith*, 11 I&N Dec. 738; *Matter of Gerhard*, 12 I&N Dec. 556; *Matter of Wighton*, 13 I&N Dec. 683; *Matter of Hoffman-ArVayo*, 13 I&N Dec. 750.[30]

The contention that the commuter interpretation was abandoned, because the regulation dealing with alien commuters was not republished when the administrative regulations were extensively revised following the adoption of the 1952 Act, was properly rejected by the Ninth Circuit in *Gooch* v. *Clark, supra*, 433 F. 2d at 79, n. 17. The commuter practice was then a well-known, long-established concept, spelled out and ratified in published administrative decisions. The revisers of the regulations may have concluded that there was no need for continuation of a specific regulation. In any event, the continued administrative adherence to the commuter interpretation was definitively asserted by the Board of Immigration Appeals a year later in *Matter of H.O.*, 5 I&N Dec. 716, and reiterated in the series of subsequent decisions noted above. The Board of Immigration Appeals speaks for the Attorney General, and those decisions that it designates as precedents are binding on the Service "in all proceedings involving the same issue or issues" (8 C.F.R. 3.1(g)).

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[30] Cf. *Matter of Weindl*, 12 I&N Dec. 621 (inadmissible on substantive grounds); *Matter of Moore*, 13 I&N Dec. 711 (same); *Matter of Estrada-Tena*, 12 I&N Dec. 429 (same).

4. This pattern of administrative interpretation, publicly announced and consistently maintained for a period of 47 years, and regularly made known to Congress (see (pp. 47–63, *infra*), cannot be lightly disregarded. Familiar principles counsel that such a solidly established and recognized practice is entitled to great weight and should not be overturned unless it is clearly wrong. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Bergh*, 352 U.S. 40, 46–47; *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 179.

B. *Congress Was Repeatedly Advised of The Administrative Interpretation, Never Disapproved It, Indeed Indicated Approval of It on Several Occasions, and In Effect Has Ratified It.*

Even had Congress remained silent and inactive in the face of 47 years of consistent administrative practice, there would have been reason to infer its approval of that practice. But there is no need to rely upon inference from silence, for there is abundant evidence of congressional awareness and assent to the administrative interpretation. We do not mean to suggest that approval of the commuter program was unanimous. From time to time, measures to end that program were introduced by individual members of Congress, particularly during periods of economic distress. But none of those measures was enacted.

1. *1927–1940.*

a. In 1929, shortly after the promulgation of General Order No. 86, a bill was introduced for the purpose of assuring the right of temporary entry for

aliens coming to work in this country. A subcommittee of the Senate Immigration Committee held a public hearing on this bill (H.R. 16927, 70th Cong., 2d Sess.) on February 25, 1920. During the hearing, there was considerable discussion of the new commuter program, of litigation then pending in the courts, and of the needs of the communities in Michigan and New York adjacent to the border. A long letter from the Secretary of Labor, then responsible for the administration of the immigration laws, was inserted in the record, fully explaining the background, legal justification, and procedural implementation of the newly-adopted commuter regulation. The Committee recessed without taking any action and we have found no indication of any further consideration of this measure.

b. In 1934, there was consideration of H.J. Res. 288, 73d Cong., 2d Sess., which sought "to temporarily restrict habitual commuting of aliens" commuting daily or at frequent intervals. The House Immigration Committee felt that the entry of Canadian commuters, "who apparently now have a legal status," was detrimental to the economic opportunities of American citizens and resident aliens; it favored a temporary cessation of their entry "during this present period of economic maladjustment." H. Rep. No. 1236, 73d Cong., 2d Sess., pp. 2, 4. The measure was not adopted by Congress.

c. The following year another bill, H.R. 4340, 74th Cong., 1st Sess., sought permanently to prevent the entry of alien commuters coming across the border to work "regularly, daily or otherwise." The bill would have required commuters to possess an immigration

visa or reentry permit on each reentry. Again there was a favorable report by the House Immigration Committee, which urged it as a measure to alleviate widespread domestic unemployment. H. Rep. No. 1276, 74th Cong., 1st Sess. Again, the legislation was not approved by Congress.

d. Two years later, a similar bill was introduced to prohibit aliens living in contiguous countries from crossing the border to work or to seek work. H.R. 3679, 75th Cong., 1st Sess. The House Immigration Committee favored the enactment of this bill to aid in alleviating widespread domestic unemployment. It pointed out that, "[u]nder existing law and pursuant to court interpretations thereof, these * * * United States workingmen who commute across the international boundary lines regularly between their homes and places of employment, are considered immigrants, but their commuters' status is recognized * * * by means of so-called identification cards which permit holders to cross the boundaries to engage in existing employment or to seek employment within the United States." H. Rep. No. 159, 75th Cong., 1st Sess., p. 2. Again, Congress refused to approve the proposal.

2. *Alien Registration Act of 1940.*

A significant legislative development took place in the consideration of the bill (H.R. 5138, 76th Cong., 1st Sess.) that ultimately became the Alien Registration Act of 1940 (the "Smith Act"), 54 Stat. 670. This bill incorporated numerous provisions dealing with national security, alien registration, and immigration. In

its original form, Section 13 of the bill made it unlawful for any alien resident of a contiguous country to cross the border for the purpose of working or seeking work in this country. Hearing before Subcommittee No. 3, House Judiciary Committee, 76th Cong., 1st Sess., on H.R. 5138 (Ser. No. 3, April 12 and 13, 1939).

At the hearing there was strong opposition to this aspect of the bill by the Department of State. The Department introduced into the record two communications from Secretary of State Cordell Hull (dated March 27, 1939, and April 13, 1937) stating that the enactment of this measure would adversely affect our relations with Canada and Mexico and could lead to retaliatory action against American citizens (*id.* at 59–62). James L. Houghteling, then Commissioner of Immigration and Naturalization, also opposed this provision in the bill (*id.* at 66). When this opposition was called to the attention of its sponsor, Representative Smith, he stated (*id.* at 74):

> I do not think that is very essential to the purpose of the bill, Mr. Chairman. I put it in there because I have understood that there is a good deal of that on the Mexican border, people coming over for the day and going back at night and taking work away from American citizens. But I do not think it is essential to the underlying purposes of this bill.

In favorably reporting the Smith Bill, the House Judiciary Committee deleted the provision proscribing the entry of commuters. The Committee explained (H. Rep. No. 994, 76th Cong., 1st Sess., p. 5):

> Section 13 * * * was eliminated because of the opposition of the State Department because of its contravention of treaty obligations.

In the bill's subsequent legislative progress, there was no further mention of any restriction against alien commuters. S. Rep. No. 1154, 76th Cong., 1st Sess.; S. Rep. No. 1721, 76th Cong., 3d Sess.; S. Rep. No. 1796, 76th Cong., 3d Sess. The Conference Committee added a provision, enacted as Section 30 of the Act, that precluded the entry of any alien who did not present a visa, a reentry permit, "or a border-crossing identification card." H. Rep. No. 2683, 76th Cong., 3d Sess., p. 5. Although the Conference Report does not explain this change, the earlier developments indicate that it was intended as a recognition and endorsement of the alien commuter practice. In any event, the alien commuter system continued to operate, and the administrative authorities thereafter designated the document they presented as a resident alien's "border crossing identification card." 8 C.F.R. 110.54, *et seq.* (1941 rev.); 8 C.F.R. Part 166 (1944 rev.).

3. *Act of 1952.*

Plaintiffs rest much of their argument in this case on the assumption that statutory revisions made by Congress in enacting the Immigration and Nationality Act of 1952 were intended to end or modify the alien commuter system. The court of appeals rejected this hypothesis (Govt. Pet. App. 26), and it was also rejected by the Ninth Circuit in *Gooch* v. *Clark, supra,* 433 F. 2d at 77. Indeed, it is quite clear that the legislative history of the 1952 Act points in the opposite direction; it indicates that Congress was fully

aware of the alien commuter program and did not intend to modify it.

The 1952 Act was the result of a four-year study conducted by the Senate Judiciary Committee, whose 925 page report was published as S. Rep. No. 1515, 81st Cong., 2d Sess. (the Omnibus Study Report). This report is a vital part of the legislative background of the Immigration and Nationality Act of 1952. With a few immaterial variances, the bill introduced on the basis of the Omnibus Study Report (S. 3455) contained the same sections that were enacted in 1952 as Sections 101(a)(15)(H)(ii), 101(a)(20), 101(a)(27)(B), 101(a)(33), 211(b), and 212(a)(14) of the Immigration and Nationality Act.[31] Consequently, what the Senate Committee said about commuters in S. Rep. No. 1515 is an authoritative guide to the construction of those sections of the Act.

The Report said about "[b]order crossers" (at 535-536; emphasis added):

> In order to facilitate traffic on the Canadian and Mexican borders, and ease, to some extent, the burden on the immigrant inspectors at the ports of entry and departure, two types of border-crossing identification cards have been instituted under the authority of section 30 of the Alien Registration Act of 1940: One for resident aliens and the other for nonresident aliens.

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[31] S. 3455 was introduced by Senator McCarran on April 20, 1950, the day the Omnibus Study Report was published. That bill was reintroduced in the next Session as S. 716, 82d Cong., 1st Sess., and was again reintroduced at the beginning of the 1952 session as S. 2550. Its companion bill, H.R. 5678, was enacted into law.

A resident alien's border-crossing identification card is a document which may be issued to

(1) a lawfully resident alien who wishes to visit Canada or Mexico for a period or periods of less than 6 months, which may be presented by him as prima facie evidence that he is returning to a lawful permanent residence, and

(2) *an alien (the so-called commuter) who has been admitted for lawful permanent residence but who resides in foreign contiguous territory and is employed in the United States.*

* * * * *

The following border crossers, in the absence of a valid visa or reentry permit, must have in their possession an alien's border-crossing identification card: (1) Lawfully resident aliens of the United States who wish to visit in Canada or Mexico for a period or periods of less than 6 months, (2) *an alien lawfully admitted to the United States for permanent residence but who resides in contiguous territory of Canada or Mexico and is employed in the United States; or* (3) citizens of Mexico who wish to enter the United States for a period or periods of not more than 29 days.

In discussing the various "nonimmigrant" classes of aliens, S. Rep. No. 1515 conversely stated (at 616; emphasis added):

> [Nonimmigrant a]liens in Canada or Mexico continually cross our borders. To facilitate inspection at ports of entry provision is made for them to apply at American consulates for border-crossing cards * * *.
>
> Cards [for nonimmigrant border crossers] will not be issued to aliens who appear to the

> consul to be immigrants rather than nonimmigrants, to aliens who intend to cross the border and remain more than 29 days, *or to aliens who have been admitted into the United States for permanent residence. Aliens in the last category who cross the borders frequently are known as commuters and are not nonimmigrants and they must apply for resident alien's border-crossing cards at the appropriate office of the Immigration and Naturalization Service.*

The Omnibus Study Report thus reflects Congress's understanding that the immigration authorities treated alien commuters as lawfully admitted "immigrants." Most significantly, the Report expressed no dissatisfaction whatever with the established administrative practice of issuing border-crossing identification cards (identifying the holders as lawfully admitted immigrants) to alien commuters.[32] Nor is there any indication whatsoever in any other part of the legislative history that Congress was in any way dissatisfied with the administrative practice of treating alien commuters as entitled to "immigrant" status and as retaining their status when they made temporary departures to return to their homes.

S. Rep. No. 1515 contains extensive discussion of immigration problems, and every exposition of an administrative procedure closes with the Committee's conclusion and recommendations. When the Committee was dissatisfied with an existing statute it recommended amendment, and when it was dissatisfied with

[32] By contrast, the Report was quite critical of the loose issuance of border-crossing identification cards to "nonimmigrants." See S. Rep. No. 1515, p. 536.

an administrative practice it condemned it.[33] There is not the slightest hint in the Omnibus Study Report of disapproval of the commuter practice. On the contrary, the Committee's comments reflect recognition and approval of the administrative interpretation.

It is significant, moreover, that Section 212(a)(20) of the 1952 Act, 8 U.S.C. 1182(a)(20), carries forward and still retains the Alien Registration Act's recognition of a "border crossing identification card" as an acceptable entry document. And Section 101(a)(6) of the 1952 Act, 8 U.S.C. 1101(a)(6), defines a border crossing identification card as a document of identity issued to "an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory." In short, it is clear that the 1952 Act was not designed to disturb the long-established commuter practice.

4. *The 1965 amendments.*

Plaintiffs argue (Pl. Pet. 13–16) that the 1965 amendment to 8 U.S.C. 1181(b) was intended to end or curtail the commuter program. As we discussed above (pp. 32–34, *supra*), Section 1181(b) originally authorized an exemption from the normal documentation requirements for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." That language was changed in 1965 to "returning resident immigrants, defined in

[33] See, *e.g.*, S. Rep. No. 1515, pp. 538–539, 556–558, and especially 611. The last cited page contains a condemnation of "preexamination," a Service innovation described at pp. 603–605. Like the commuter system, it had not been expressly authorized by statute.

section 1101(a)(27)(B)." We have already shown that the change does not affect commuters, because they fall within the class described in Section 1101(a)(27)(B).

Plaintiffs argue, however, that the change was meant to affect the practice of admitting commuters. They rely for this position on a 1963 discussion between L. Paul Winings, then General Counsel of the Service, and Walter Besterman, then a legislative assistant of the House Judiciary Committee. This discussion, characterized by the court in *Gooch* as "an obscure colloquy" (433 F. 2d at 80), occurred during the course of Hearings on Population and Immigration Problems conducted in 1962 and 1963 by Subcommittee No. 1 of the House Judiciary Committee, 88th Cong., 1st Sess. (The discussion of commuter workers appears in Special Series No. 11 and is quoted in part at Pl. Pet. 15.)

The 1963 discussion is indeed a slender reed on which to rest an inference of legislative intent. We are puzzled by plaintiffs' assertion (Pl. Pet. 15, n. 1) that Mr. Besterman "was speaking on behalf of the Subcommittee," presumably in rejecting the administrative practice with respect to commuters. The record does show that Mr. Besterman was propounding *questions* on behalf of the Subcommittee to "explore" the legal basis and economic impact of the commuter practice (Hearings at 166, 167). But we do not read his remarks as expressing a firm opinion. He was, moreover, a staff employee, not a member of Congress.

At the hearings, Mr. Winings made a thorough presentation explaining the background and legal justification of the commuter practice, and there was

little discussion by any member of the Subcommittee. No member of the Subcommittee expressed doubt concerning the Service's interpretation of the 1952 Act or suggested a need to change it.[34] The Subcommittee never issued a report on this phase of its inquiry and never proposed any legislative changes.

Respondents assert that the 1965 Act's revision of Section 1181(b), characterized in *Gooch* as "a minor and obscure change in the language" (433 F. 2d at 80), in fact resulted from the 1963 discussion and was intended to change the commuter practice (Pl. Pet. 16). No documentation is offered to support this hypothesis.

The 1965 legislation was initiated in a proposal by President Kennedy to Congress on July 23, 1963, designed primarily to abolish the national origin quota system. Various bills to effectuate President Kennedy's recommendations were introduced and many hearings were held. On January 13, 1965, President Johnson urged Congress to act on these proposals. H. Doc. No. 52, 89th Cong., 1st Sess. The bill was extensively amended and introduced as H.R. 2580, 89th Cong., 1st Sess.

A revised version of H.R. 2580 was favorably reported to the House on August 6, 1965. H. Rep. No. 745, 89th Cong., 1st Sess. The Committee report adverted to the many hearings held on this measure in 1964,[35] and to the primary objective of abolishing the

[34] Representative Poff correctly characterized the commuter's status as "somewhat unique" (Hearings at 166).

[35] There is no mention of the unrelated hearings held in 1962 and 1963, including the one in which the discussion between Winings and Besterman took place.

national origin quota system (*id.* at 1, 10). It listed 9 basic changes proposed by the Committee, none of which even implied an intention to change the commuter practice (*id.* at 18).

The Senate Committee Report also referred to numerous hearings conducted by the Committee in 1964 and to the primary purpose to repeal the national origin quota system. S. Rep. No. 748, 89th Cong., 1st Sess., p. 10. The report then stated (*ibid.*; emphasis added):

> In addition to numerous *technical and minor changes,* the bill would also make other basic changes in the Immigration and Nationality Act, as follows: * * *

The Report then listed 12 "basic changes," none of them relating to commuters.

Viewing the "eloquent silence * * * in the massive legislative history of the 1965 changes," the Ninth Circuit could find no basis for concluding "that Congress intended to close our borders to commuters when it enacted a technical revision of section 1181(b)." *Gooch* v. *Clark, supra,* 433 F. 2d at 80, 81. We agree. It is reasonable to conclude that if Congress had intended to make a major change in the long-established commuter system, some indication of that purpose would have emerged at some point in the comprehensive and carefully developed legislative history of the 1965 Act. The "eloquent silence" in that legislative history, broken only by the inconsequential exchange between Winings and Besterman, is a compelling indication that the commuter system was not meant to be affected.

5. *Post-1965 legislative activity.*

In recent years, there has been much discussion of the commuter practice, and a number of legislative proposals to terminate it have been introduced. In all of the legislative discussions, the Service has maintained its continued adherence to the established administrative treatment of commuters under the 1952 Act, and there is no indication that Congress views the Service's interpretation of the Act as incompatible with the legislative intent. Moreover, Congress has not yet acted on any of the legislative proposals to change the commuter practice.

Section 21 of the 1965 Act, 79 Stat. 920, provided for the establishment of a Select Commission on Western Hemisphere Immigration. The legislative members of the Select Commission included some of the most active and knowledgeable members of Congress in immigration matters: Senators Eastland, Kennedy, and Hart, and Representatives Celler, Feighan, and Rodino. The Service submitted a paper to the Select Commission fully discussing the background and legal basis for its commuter interpretation. Western Hemisphere Report, *supra,* pp. 99 *et seq.* The Commission made no recommendation with respect to alien commuters. Its report stated (*id.* at 14):

> The Commission's attention has also been directed to the matter of "commuters" and the problems presented by the employment in the United States of persons admitted as permanent resident aliens but opting to live in Mexico or Canada. Brief hearings have been held on this matter by several members of Congress

> and legislation has been introduced to alter the status of these "commuters." The Commission proposed to study this matter by holding hearings within the next few weeks and may make recommendations on this subject in the form of an addendum to this report or via individual comment of Commission members, as may seem appropriate.

Months after submission of the Commission's report, two of its members, Chairman Richard M. Scammon and Stanley H. Ruttenberg, Assistant Secretary of Labor, addressed a letter to the President, dated July 22, 1968, making personal recommendations, on which they were not in agreement, for changes in the statute to modify the alien commuter practice. No legislation has yet resulted from these recommendations.

Previously, there had been hearings on alien commuters before the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee on September 22, 1967, at which Service representatives appeared and discussed their interpretation and application of the commuter system. These hearings were never published, and were not followed by any Committee report or legislative proposals sponsored by the Committee.

On February 19, 1969, the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, issued a report on the Migratory Farm Labor Problem proposing changes in the alien commuter system. The report stated that "[t]he prob-

lem of the commuting alien can be resolved not by drastically putting an end to the commuter system, but by refining its current operations." S. Rep. No. 91–83, 91st Cong., 1st Sess., pp. 61–65. Thereafter, the same Subcommittee held hearings on the Border Commuter Labor Problem on May 21, 1969. Those hearings, including comprehensive responses by the Service to detailed questions posed by the Committee, are included in Part 5–A of the published hearings. The Committee has issued no further report and has neither proposed nor acted on specific legislative amendments.

In 1970, Subcommittee No. 1 of the House Judiciary Committee conducted hearings on various proposed changes in the immigration laws. In the course of the hearings Representative Feighan, then Chairman of the Subcommittee, called attention to bills proposing changes in the commuter practice, and discussed the implications and desirability of such legislation with Charles Gordon, General Counsel of the Service, testifying before the Committee. Mr. Gordon urged the desirablity of legislative consideration of this problem, and suggested alternative approaches. Hearings on H.R. 9112, H.R. 15092, H.R. 17370, 91st Cong., 2d Sess., pp. 205–207. Mr. Gordon stated (*id.* at 207):

> Beyond that, under the present statute we feel that the course of 43 years of continuous interpretation, following what we believe is the policy which Congress wants us to follow, has to be continued. If Congress wants to make a different policy, we think it is appropriate and desirable, indeed, to have this spelled out in the statute.

The Committee did not express any disapproval of this statement, and has never issued any report or endorsed any bill making such legislative changes.

Finally, we point out that in recent years a number of bills seeking changes in the alien commuter system have been introduced in Congress.[36] Some of these would require aliens admitted as immigrants to become actual residents. Some would create a new nonimmigrant class for border-zone workers. Some would require commuters to comply periodically with labor certification requirements. Some would allow a phase-out period for the commuters.[37] But none has yet been favorably reported by any congressional committee, and no bill to change the alien commuter system has been approved by Congress.

6. The foregoing survey of legislative history bearing upon the commuter practice demonstrates a continuous awareness by Congress of the alien commuter program during its entire 47-year history and an absence of any authoritative indications of legislative disapproval. Indeed, there are positive expressions of congressional approval at critical junctures in the legislative development, and the total picture is one of acceptance and ratification. In the light of this overwhelming array of evidence, we submit that the ad-

[36] These bills include the following. *90th Congress:* S. 2790, H.R. 17493; *91st Congress:* S. 1694, H.R. 9505, S. 3545; *92d Congress:* S. 1373, H.R. 8746, S. 1488, H.R. 15309, H.R. 14831; *93d Congress:* S. 2643, H.R. 3870, H.R. 10141, H.R. 10466, H.R. 980.

[37] Several of the proposals are discussed in the Notes cited in note 24, *supra*, 21 Stanford L. Rev. at 1768–1776, and 48 N.Y.U. L. Rev. at 476–479.

ministrative interpretation has been and continues to be a reasonable and lawful interpretation of the will of Congress.

C. *Determining the Future of the Commuter Program Requires the Resolution of Competing International and Economic Interests; That Task is a Peculiarly Legislative One That Should, Particularly In View of the History of Congressional Acquiescence in and Approval of the Commuter System, Be Left to Congress*

It is fair to conclude from the long-standing administrative practice with respect to alien commuters, and the pattern of congressional acquiescence in and approval of the commuter system, that the Service's interpretation of the current statute is correct and that any change in the treatment of commuters must be initiated by Congress rather than the courts. That conclusion is bolstered, we submit, by the delicacy of the interests that must be reconciled in deciding upon the future of the program. The nature of the problem makes it peculiarly suited for legislative, rather than judicial, resolution.

1. In pressing their attack upon the commuter program, plaintiffs invoke the interests of American workers in adequate employment opportunities, wages, and working conditions. These are unquestionably legitimate concerns. But one must not overlook the other important interests that would be affected by an abrupt termination of the commuter system.[38]

[38] The competing considerations are explored in some depth in the Notes cited in note 24, *supra*, 21 Stanford L. Rev. at 1762–1768, and 48 N.Y.U. L. Rev. at 473–476.

First there is at stake the livelihood of thousands of alien commuters, most of whom have been commuting to stable employment in this country for many years. There are more than 42,000 daily commuters from Mexico, some 25,000 of whom are engaged in occupations other than agriculture. The total of Canadian commuters exceeds 12,000. Western Hemisphere Report, *supra,* at 104. The Service has estimated that there are an additional 8,300 seasonal commuters.[39] Termination of the program would profoundly affect the lives of these persons and of the many thousands of family members who are economically dependent upon them.[40] As the court of appeals stated with respect to daily commuters (Govt. Pet. App. 28):

> [W]e are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of

[39] This figure includes only those commuters who reside in this country for six months or less each year. Any immigrant who resides here for longer than six months per year is considered by the Service to be an actual resident, not a commuter (see Govt. Pet. App. 23–24, n. 14). The court of appeals, however, held that this practice by the Service "is without statutory or logical basis" (*ibid.*). We disagree with that holding, because we believe the Service may properly infer from an immigrant's residence in this country for more than half the year that his "principal, actual dwelling place in fact" (8 U.S.C. 1101(a)(33)) is in the United States. But if the court of appeals is correct that "seasonal commuter" includes any immigrant who has a home in Mexico to which he returns at some time during the year, then the number of seasonal commuters affected by the decision below would be substantially larger than 8,300.

[40] The State Department has estimated that there are 250,000 family members dependent on the income earned by commuters. Statement of Assistant Secretary of State Oliver to the Senate Subcommittee on Immigration, September 25, 1967, p. 6.

> our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardships. * * *

Sudden termination of the program might also have a disruptive effect on the economy of border communities on both sides of the border. It has been estimated by the U.S. Commission on Civil Rights, for example, that Mexican commuters would stand to lose $50 million of annual income;[41] the State Department has estimated that commuters account for 25 to 30 percent of the income earned by the labor force in some Mexican border communities.[42] Termination of the commuter program might intensify the existing unemployment problems in the Mexican border area (see Note, *supra*, 48 N.Y.U. L. Rev. at 474).

Moreover, since commuters have been lawfully admitted for permanent residence, they would be free to establish permanent residences in this country if their commuting rights were curtailed. The impact on American border communities of a substantial number of new residents, requiring housing and education, would obviously be significant (see *id.* at 475–476).

Still another interest that must be taken into account is that of the agricultural and other employers in the border area who depend upon the labor of alien

[41] See U.S. Commission on Civil Rights, *Stranger in One's Land*, p. 12 (1970).

[42] See Statement of Assistant Secretary of State Oliver, *supra* note 40, at 4.

commuters. An abrupt end to the commuter program could decimate their work force.

2. Apart from the difficult questions of domestic economic and labor policy that would be implicated in any decision on the future of the commuter system, substantial and delicate issues of foreign policy would be raised as well. The affidavit of former Secretary of State William P. Rogers (Govt. Pet. App. 38–40), submitted in the district court, states that "[a] sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada" (*id.* at 38).[43] The Department of State had expressed similar apprehensions in letters of Secretary of State Cordell Hull in 1937 and 1939 (see p. 50, *supra*), and in affidavits of Secretary of State Dean Rusk, submitted in *Texas State AFL–CIO* v. *Kennedy,* 330 F. 2d 217 (C.A. D.C.), certiorari denied, 379 U.S. 826, and in *Gooch* v. *Clark, supra.*

Secretary Rogers' affidavit in this case explains in some detail the reason for those apprehensions. The "flow of persons and goods across the United States-Mexican border has helped the development of strong

[43] Although the affidavit draws no distinction between daily and seasonal commuters, the court of appeals construed it as directed only at daily commuters (Govt. Pet. App. 21, n. 9). The Department of State has advised us that no such distinction was intended and that the concerns expressed in the affidavit apply to seasonal as well as daily commuters. If the matter were deemed pertinent on remand, the Department of State would consider submitting a further affidavit from Secretary of State Kissinger confirming this advice.

and mutually beneficial economic relations" (Govt. Pet. App. 38). A "disruption in the life" of the border cities—some of which "have grown into single economic communities"—"would do real harm to good neighbor relations in the area" (*id.* at 39). Purchases by Mexican nationals of American goods on this side of the border "constitute a major portion of retail sales" (*ibid.*); if significant numbers of Mexican nationals were deprived of their earning power because of a reduction in commuter traffic, "trade between the two countries along the border would be substantially reduced," and there would likely be "an immediate depressing effect on the economy of the region on both sides of the border" (*ibid.*).

Similarly, "Canadian commuters * * * are a significant element in the economies of the United States and Canada" (*id.* at 40). A "sudden disruption of this traditional practice would be inconsistent with the trend toward closer economic cooperation with Canada" and "could also adversely affect our relations with Canada and the status of United States nationals and investment in Canada" (*ibid.*). According to the affidavit, the "Government of Canada, like the Government of Mexico, has expressed its concern over litigation attacking the status of immigrant alien commuters" (*ibid.*).

For these reasons, Secretary Rogers concluded (*ibid.*):

> [I]t is my opinion that the judicial termination of the commuter system would be damaging to the foreign relations of the United States.

> Any adjustment that may be desirable should be fashioned by administrative or legislative processes which are better suited to distinguish situations and to accommodate conflicting interests.

3. We thus agree with the court of appeals' conclusion (though we would extend it to both classes of commuters) that, in view of the administrative and legislative history of the commuter program, any change in the system should be left to Congress. The court stated (Govt. Pet. App. 27):

> Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice, efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.

As Secretary of State Rogers indicated, Congress has the institutional capacity to weigh all the complex considerations of foreign and domestic policy, to accommodate the important conflicting interests, and to solve the problems with the characteristic flexibility of the legislative process. In the absence of clear evidence that Congress has already performed that task and has determined to end the long-standing commuter program, we submit that any modification in that program should be left to the crucible of the legislative process.

III

THE SEASONAL COMMUTER PROGRAM STANDS ON THE SAME FOOTING AS THE DAILY COMMUTER PROGRAM

The court of appeals held that the seasonal commuter program, unlike the daily commuter program, is inconsistent with the statute. That conclusion rests, we submit, upon a fundamental misconception concerning the relationship of the "bracero" program to the commuter program.

1. The bracero program began in the period of manpower shortages following World War II. It was established by an agreement between the United States and Mexico, known as the Migrant Labor Agreement of 1951, which provided for the recruitment of Mexican nationals for agricultural work in the United States under established safeguards. The agreement was implemented in 1951 by temporary legislation that was thereafter extended from time to time.[44]

The legislation authorized the Secretary of Labor to recruit agricultural workers from the Republic of Mexico, to transport them to the United States, and to assist them in negotiating employment contracts (7 U.S.C. 1461). Recruited workers were "admitted to the United States subject to the immigration laws * * *

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[44] The 1951 legislation amended the Agricultural Act of 1949, 63 Stat. 1051, by adding a new Title V entitled "Agricultural Workers" (65 Stat. 119). The subsequent amendments and extensions are found at 67 Stat. 500, 68 Stat. 28, 69 Stat. 615, 72 Stat. 934, 74 Stat. 1021, 75 Stat. 761, and 77 Stat. 363. The current text of Title V still appears as 7 U.S.C. 1461–1468, even though the program has been terminated

for such time and under such conditions as may be specified by the Attorney General" (7 U.S.C. 1464). During the life of the program, hundreds of thousands of braceros were admitted each year for temporary employment in the United States (see 1964 Annual Report of the Immigration and Naturalization Service, p. 60). Constantly rising opposition to the bracero program, however, culminated in Congress's refusal to extend it beyond December 31, 1964, and the program terminated on that date. See 1 Gordon and Rosenfield, *Immigration Law and Procedure*, § 6.9.

The court of appeals stated that "the Service after the termination of the bracero program in 1964 created a new class of commuter—a 'new immigrant,' the seasonal worker" (Govt. Pet. App. 20). In its view, "[t]he metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers" (*ibid.*). The seasonal commuter program, according to the court, "is a short-lived invention of the Service * * * which flies in the face of traditional Congressional concern for the American working man" (*id.* at 21), "a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program" (*id.* at 30). These observations are the foundation for the court's holding that seasonal commuters, unlike daily commuters, may not properly be admitted to this country as lawfully admitted immigrants returning from a temporary visit abroad.

The court's characterization of the seasonal commuter program appears to rest on two assumptions: (1) that the program began after the bracero program was terminated, and (2) that "seasonal commuter" is simply a new name given the former bracero. These assumptions are not supported by the stipulation of the parties or by anything else in the record. They are, in fact, incorrect.

In finding that the Service "in 1964 created a new class of commuter" (Govt. Pet. App. 20), the court relied on a 1967 statement by a former official of the Service that seasonal commuters came into being "*largely* after the repeal of the bracero law" and that "*many of them* are former braceros" (see *ibid.*; emphasis added). But that statement does not suggest that there were no seasonal commuters previously. On the contrary, it is wholly consistent with the fact that the seasonal commuter concept had developed long before the bracero program was terminated.[45]

There was in fact an increase in the number of seasonal commuters in the years *before* termination of the program.[46] This resulted in part from efforts by em-

[45] Nor do we comprehend the logic of the court's apparent reliance upon a statement of counsel at oral argument that the seasonal commuter was "inconspicuous" prior to the 1952 Act (Govt. Pet. App. 20, n. 7). That the government "admitted" (*ibid.*) this fact hardly supports a finding that the program originated in 1964.

[46] The Annual Reports of the Service show that total immigration from Mexico was increasing before 1964 but that it dramatically decreased in fiscal 1964 and only slightly increased in fiscal 1965 (when the bracero program was terminated). Chart 8 in each of the Annual Reports shows the following fig-

ployers to encourage their bracero workers to apply for and obtain the status of immigrants lawfully admitted for permanent residence. This is confirmed by a letter from the Mexican Ambassador to the United States to the Secretary of State, dated June 21, 1963, set forth in H. Rep. No. 722, 88th Cong., 1st Sess., p. 7. The letter states:

> In the last 3 years there has been a considerable increase in the number of Mexican farmworkers who have applied for and obtained residence visas to come to the United States, through letters issued by farmers and growers in the United States who have offered them employment. It is estimated that no less than 32,000 farmworkers obtained their documents in 1961 and possibly some 40,000 in 1962.

To similar effect is the following excerpt from the Western Hemisphere Report, *supra,* p. 104:

> The number of commuters increased rapidly along the Mexican border during the years of the bracero program. U.S. employers assisted the best of the braceros in obtaining immigrant visas and status as permanent residents. These workers retained their domicile in Mexico and became commuters, forming a pool of legal agricultural workers near the border. It was this pool of available legal labor which played a major role in the termination of the bracero program.

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ures for the number of Mexican immigrants admitted annually: 1959—23,061; 1960—32,684; 1961—41,632; 1962—55,291; 1963—55,253; 1964—32,967; 1965—37,969. These figures do not support the court of appeals' suggestion that the many thousands of braceros were redesignated immigrant commuters when the program ended in December 1964.

While many braceros may have become seasonal commuters, the program was not a "synthetic construct" (Govt. Pet. App. 30) designed to circumvent the termination of the bracero program. Unlike most of the Mexican nationals who were specially admitted as braceros, an alien admitted under the seasonal commuter program first had to attain the status of an immigrant lawfully admitted for permanent residence. That status could be gained only upon compliance with every substantive, procedural, and documentary requirement prescribed by law for the admission of immigrants. If a seasonal commuter's initial entry as an immigrant occurred after the effective date of the 1965 amendments to the Act, he would have had to satisfy in addition the new labor certification requirements discussed above (pp. 36–39, *supra*). But once he had achieved lawful admission for permanent residence, he was no longer dependent upon the bracero program for his seasonal readmissions. Like the daily commuter, he was treated under the Act as returning from a temporary visit abroad.

There is thus no basis for the court's assumption that "seasonal commuter" is simply a new name for "bracero." Not all braceros became seasonal commuters because not all sought and obtained lawful admission as immigrants. Those who did had a new status that they lacked as braceros, and that new status entitled them to seasonal readmission so long as the status remained unchanged. There was no administrative legerdemain and no evasion of congressional will. Some braceros simply took advantage of a procedure

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that was available well before that program ended. That the seasonal commuter program grew as the bracero program reached an end suggests only that more of the farmworkers sought immigrant status, not that the Service redesignated the braceros as seasonal commuters and continued to admit them on the same basis as before.

2. The court's misapprehension concerning the history and structure of the seasonal commuter program, and particularly its relationship to the bracero program, also accounts for its failure to recognize that congressional approval of the Service's commuter practice extends to both the daily and seasonal programs. The premise of the court's analysis—that the seasonal program is so "recent in origin" and "synthetic," "hastily assembled after the termination of the bracero program," "that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute" (Govt. Pet. App. 30)—we have shown to be without support.

The fact is that there has never been any significant distinction between the daily and seasonal commuters. The Service has always taken the position that a lawfully admitted immigrant returning from a visit to his home in Mexico or Canada is in the identical legal posture whether his stays in this country are for one day, two days, a month, or a whole season. What has mattered is that he has previously been admitted as an immigrant with the privilege of establishing a permanent residence, and that his status has not changed. Congressional approval of this practice has

in no instance been limited to commuters who cross the border daily. And, while seasonal commuters may not have been a large group until the early 1960's, the administrative practice predates the end of the bracero program and, like the daily commuter practice, is entitled to great weight in interpreting the present statutory language.

3. The court of appeals also rested its separate treatment of seasonal commuters on its reading of Secretary of State Rogers' affidavit (Govt. Pet. App. 38–40) as applying only to daily commuters (*id.* at 21, n. 9, and 29, n. 26). We have already shown (p. 66, n. 43, *supra*), that this interpretation of the affidavit is incorrect and that the concerns expressed in the affidavit relate to termination of the seasonal commuter program as well as the daily program.

4. Finally, the court held (1) that seasonal commuters must be treated as nonimmigrants under 8 U.S.C. 1101(a)(15)(H)(ii) because, unlike daily commuters, the services they perform in this country are temporary (Govt. Pet. App. 22–23 and n. 13), and (2) that they cannot be treated as "returning resident immigrants" free to enter with informal documentation under 8 U.S.C. 1181(b) because, unlike daily commuters, their place of employment cannot be equated with the concept of "residence" (*id.* at 28).

We think the court's distinctions are illusory. The services performed by seasonal commuters are of no less permanent nature than those performed by daily commuters (see p. 21, n. 11, *supra*), and the seasonal commuter, who actually lives in this country during

protracted periods, can be said no less than daily commuters to be residing at his place of employment (see p. 32, n. 19, *supra*).

But we have, in any event, already demonstrated that, regardless of whether their services in this country are temporary or permanent, neither daily nor seasonal commuters can be viewed as nonimmigrants. Even if they were to follow the prescribed procedure for seeking that status (see pp. 22–23, *supra*), they would be disqualified from classification as nonimmigrants so long as unemployed laborers could be found in the United States to perform the services performed by commuters (see pp. 19–21, *supra*). Likewise, we have shown that actual residence in this country is not required in order to acquire and retain the status of an immigrant lawfully admitted for permanent residence (pp. 24–28, *supra*). It is therefore immaterial whether daily or seasonal commuters may be said to reside at their place of employment.

5. We therefore conclude that seasonal commuters cannot be treated differently from daily commuters under the Act. If members of the former class cannot be readmitted to this country as special immigrants, we see no basis in law or logic for permitting daily commuters to be readmitted on that basis either. The two programs must stand or fall together.

The administrative practice of permitting seasonal commuters to acquire and retain the status of aliens lawfully admitted for permanent residence is consonant with the traditional and congressionally approved administrative interpretation in regard to daily com-

muters. It rests on the same statutory provisions, legislative intent, and policy considerations, and is a reasonable and proper implementation of the legislative will.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the validity of the daily commuter program, and should be reversed insofar as it invalidates the seasonal commuter program. The case should be remanded with directions to reinstate the judgment of the district court.

Respectfully submitted.

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MARCH 1974.

APPENDIX

A. Statutes and Regulation Involved

1. Section 101(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a), provides in part:

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * * *
>
> (B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;
>
> * * * * *
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; * * *.
>
> * * * * *
>
> (20) The term "lawfully admitted for permanent residence" means the status of having been

lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(27) The term "special immigrant" means—

* * * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; * * *.

2. Section 211 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1181, provides:

(a) Except as provided in subsection (b) no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General. * * *

(b) Notwithstanding the provisions of section 212(a)(20) of this Act in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 101(a)(27)(B), who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation.

3. Section 212(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a), provides in part:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to

receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);

* * * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a); * * .

4. 8 C.F.R. 211.1 provides in part:

> (b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I–151 Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I–151, Alien Registration Receipt Card, duly issued to him * * *.
>
> When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I–151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination.
>
> (2) *Reentry permit.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad may present a valid, unexpired reentry permit duly issued to him. * * *
>
> (3) *Waiver of visas.* An immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad who satisfies the district director in charge of the port of entry that there is good cause for his failure to present an immigrant visa, Form I–151, or reentry permit

may, upon application on Form I–193, be granted a waiver of that requirement. * **

B. Excerpts From General Order No. 86

U.S. Department of Labor, Bureau of Immigration, Washington

APRIL 1, 1927.

No. 55479/537; 55266 General.

GENERAL ORDER NO. 86

Subject: Land border crossing procedure

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.

2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

A. Aliens whose original admission occurred prior to June 3, 1921.

B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

* * * * *

3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying

the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

IMMIGRANT

* * * * *

10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

* * * * *

12. The status of holders of identification cards shall be inquired into periodically * * *. When the holder of a "non-immigrant" identification card qualifies as an "immigrant," a new identification card shall be issued, stamped to show the correct status.

GEORGE J. HARRIS,
Acting Commissioner General.

Approved:
ROBE CARL WHITE,
Assistant Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.
FILE
APR 19
MICHAEL RODAK, JR.

Nos. 73-300 and 73-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
Petitioners,
v.
ROBERT BUSTOS, ET AL.

CRISTOBAL CARDONA, ET AL.,
Petitioners,
v.
WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

ROBERT BUSTOS, ET AL.

No. 73-480

CRISTOBAL CARDONA, ET AL.,
Petitioners,

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-30) is reported at 481 F.2d 479. The district court issued no opinion.

JURISDICTION

The petitions for writs of certiorari were granted on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 73-300

1. Whether Mexican aliens who commute to the United States to work only *during the agricultural season* and who do not maintain residences in this country when they return to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has "a residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States" to perform temporary services or labor" (8 U.S.C. 1101(a)(15)(H)).

No. 73-480

1. Whether Mexican aliens who commute *daily* to the United States to work and who do not maintain residences in this country when they return each evening to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has a "residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform temporary services or labor" (8 U.S.C. 1101 (a) (15) (H)).

STATUTES AND REGULATIONS INVOLVED

Section 101(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a), provides in pertinent part:

§ 1101. Definitions.

(a) As used in this chapter—

* * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.

* * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent

residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

Section 211 of the Act, 8 U.S.C. 1181, provides:

§ 1181. Admission of immigrants into the United States.

(a) Except as provided in subsection (b) no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and (2) presents a valid unexpired passport or other suitable travel document or document of identity and nationality, if such document is required under the regulations issued by the Attorney General. * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

Section 212(a) of the Act, 8 U.S.C. 1182(a), provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. * * *

* * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a) * * *.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Large numbers of Mexican nationals work as agricultural laborers in Southwestern United States, particularly California, Arizona, and Texas.[1] These Mexican nationals originally entered the United States as immigrants in order to become permanent resident aliens. They fall into three categories:

First, some of these Mexican nationals live permanently in the United States. While such actual permanent residents of the United States may visit Mexico or other places outside of the United States, they have homes which they continue to own or rent in this country. This litigation does not affect the status of these nationals.

Second, some of these Mexican nationals do not live in the United States during any period of the year. These nationals are "daily commuters," who cross the border daily from homes in border areas of Mexico to work in the fields in border areas of the United States and return to Mexico each evening. They may commute daily only during the agricultural season.

Third, some of the Mexican nationals are seasonal workers who come to the United States for a number of months—usually four to six—during the agricultural season each year.[2] These seasonal commuters return after the agricultural season to their permanent homes in Mexico which they own or rent or where they stay with friends or relatives. They may come to a single place of employment in the United States or move from one

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[1] Appendix A, pp. 94-97 below, reviews studies concerning the serious effect which the daily and seasonal commuters have on the wages, working conditions, and employment of domestic farm labor.

[2] The two kinds of commuters are briefly described in Gordon and Rosenfield, *1 Immigration Law and Procedure*, Sec. 2.19 (1973 Supp.).

American employer to another during the agricultural season. They may return to the same place or places of employment each year or work wherever an opportunity happens to arise.[3]

Robert Bustos and Lupe Murquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit

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[3] The *amicus curiae* brief of Bud Antle, Inc. suggests that the facts relating to commuters are more complex than the two categories described by the court of appeals and in this brief. This is doubtless true in the sense that the question whether a particular commuter has his permanent residence in the United States or Mexico depends on the particular facts. See *Transatlantica Italiana* v. *Elting*, 66 F.2d 542 (C.A. 2, 1933). However, once a determination is made, based on the facts of each case, that the alien's residence is in Mexico, there are two major categories of commuters, daily and seasonal.

abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is sufficient and the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants. The Act includes among the categories of non-immigrants "an alien having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor." 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has not issued such certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations prohibiting commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1), by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists.

On May 13, 1970, the district court granted the motion of four Texas farm workers to intervene as plaintiffs on behalf of themselves and all farm workers in Texas.[4] On June 8, 1970, the parties agreed to a stipulation of facts (Gov. Pet. App. D, pp. 34-37). On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs for summary judgment, and dismissed the complaint (Gov. Pet. App. C, p. 33).

On appeal, plaintiffs renewed their arguments on all the claims described above. On April 16, 1973, the court of appeals held that, with regard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contended" (Gov. App. A, p. 28). The court said that since the practice as to daily commuters began in 1927 and has continued for 45 years, and since Congress has never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 27).[5] The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (Gov. Pet. App. A, p. 21). Moreover,

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[4] The plaintiffs and plaintiff-intervenors will be referred to herein as the plaintiffs.

[5] Appendix B, pp. 98-107 below, sets forth the history of the daily and seasonal commuter practice.

since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 22-23). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strengthened the Immigration Act of 1965 to safeguard American labor (*id.* at 18-21).

On April 30, 1973, the plaintiffs filed a Petition for Clarification and Rehearing limited to two points. First, they contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. They asked, however, that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, they requested that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (Pl. Pet. App. D, pp. 37-38). However the court explicitly did not determine the merits of the arguments advanced by the plaintiffs. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion,

first by the district court, and if necessary by this court on appeal." [6]

SUMMARY OF ARGUMENT

I

The Immigration and Naturalization Service considers both daily and seasonal commuters as immigrants. If commuters are immigrants, they are required to have immigrant visas and labor certifications from the Secretary of Labor in order to enter the United States.

A. The plain language of the Immigration and Nationality Act and the Service's own regulations require commuters to obtain immigrant visas.

Section 211(b) of the Act allows only "returning resident immigrants" to enter without immigrant visas. Section 101(a)(33) defines "residence" to mean:

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

Seasonal commuters, who have no permanent home in the United States which they retain but have a permanent

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[6] This case thus does not involve the question as to the meaning of the Service's strike breaker regulations, 8 C.F.R. 211.1(b)(1), since that issue was not decided below and was not presented in the petitions for writs of certiorari. This case even less presents the question argued by the *amici curiae* brief of the American Farm Bureau Federation, *et al.* (pp. 20-22), that the strikebreaker regulation is not authorized by the Immigration and Nationality Act since that issue was not raised by the complaint and has never been presented by any party at any stage of the case.

Similarly, contrary to the argument of the *amici curiae* (pp. 17-20), no questions are presented as to the rights of commuters to fair hearings before they can be excluded from the United States. If this Court determines that commuters cannot enter the United States without immigrant visas, aliens will of course be entitled to an opportunity to show that they are not commuters or, if they are, that they are entitled to visas.

home in Mexico, are not residents of the United States because they plainly have their "principal, actual dwelling place in fact" in Mexico. Daily commuters are likewise obviously not residents of the United States since they have no "dwelling place in fact" of any kind in the country. While the court below said that a daily commuter could be considered a resident of the United States because residence may mean his place of work, a commuter's place of work is not "his principal actual dwelling place in fact." Indeed, the Service admits that commuters are not residents of this country.

The Service contends that Section 211(b) does not require commuters to be "returning resident immigrants" at all in order to enter the United States because the Act states that "returning resident immigrants, defined in Section 101(a)(27)(B)" may enter without a visa. It argues that the commuter need only satisfy the requirements of Section 101(a)(27)(B) which, the Service says, requires only that the commuter have the status of being admitted for permanent residence in contrast to being actually a resident of this country. We submit that this interpretation of Section 211(b) reads the phrase "returning resident immigrants" entirely out of the Act.

Even if it is not an independent requirement, at the least, the phrase "returning resident immigrants" is persuasive as to the meaning Congress intended in Section 101(a)(27)(B). Congress would not have intended to define "returning resident immigrants" to include nonresidents. Thus, Section 211(b) shows that Congress intended Section 101(a)(27)(B) to be essentially the equivalent of "returning resident immigrants."

2. Commuters do not come within Section 101(a)(27)(B). That Section covers aliens who are "neither lawfully admitted for permanent residence" nor "returning from a temporary visit abroad." "Lawfully admitted for permanent residence" is defined by Section 101(a)(20)

of the Act as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant, such status not having changed." The status of commuters has changed because they are not residents. Moreover, any interpretation of Section 101(a)(20) to include commuters will produce obviously incongruous results under the many other sections of the Act which likewise refer to immigrants "lawfully admitted for permanent residence." Since the same definition is applicable to the entire Act, the Service's interpretation makes no sense in the context of the entire statute.

In any event, it is clear that commuters are not "returning from a temporary visit abroad" when they seek to enter the United States. Since the commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is not from the United States to Mexico but from Mexico to the United States. The courts have repeatedly held that a temporary visit abroad means an absence in a foreign country without relinquishment of domicile in the United States. The Service's General Counsel conceded in 1963 that a visit was an absence from "a more permanent place" and therefore that the commuter practice did not rely on Section 101(a)(27)(B) which referred to a "temporary visit abroad" but rather on Section 211 which referred to "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 169. Since Congress removed in 1968 the language of Section 211(b) on which the Service relied and referred to Section 101(a)(27)(B), commuters clearly may no longer enter the country without a visa under Section 211(b).

3. The Service's own regulations specifically provide that immigrants may enter this country without visas only if they have "an unrelinquished lawful permanent residence in the United States after a temporary absence abroad." 8 C.F.R. 211.1(b)(1). This regulation explicitly requires actual, unrelinquished residence in this country rather than merely the status of having been admitted for permanent residence. The regulation supports the plain meaning of Section 211(b) that it requires actual residence in the United States. Moreover, even independent of the language of Section 211(b) itself, that section allows aliens to enter the United States only if the Attorney General so provides and "under such conditions as may be by regulations prescribed." The Attorney General by regulations has allowed immigrants to enter without visas conditioned upon unrelinquished residence in this country.

4. The admission of commuters without visas cannot be justified on the ground of administrative practice or Congressional reenactment.

First, when, as here, the language of the statute is plain, it is of course controlling. Moreover, the language of the Act is further supported by the purpose of the immigration laws generally and of the specific provisions involved in this case to protect American labor from competition from low-wage foreign workers. Congress has significantly tightened the language of several of the relevant provisions both in 1952 and 1965 to carry out this purpose.

Second, the Service has often admitted that the practice is not authorized by any statute. It has repeatedly admitted that the commuter system is "a device of convenience," is an "amiable fiction," and "does not fit precisely within the statutory patterns." The Board of Immigration Appeals has concluded that commuters can enter without visas "based upon the fiction that their

presence in the United States while employed amounts to permanent residence in the United States." *Matter of Hoffman-Arrayo*, 13 I & N 750, 752, note 2 (1971).

Third, the commuter practice is not of long duration in any meaningful sense. The seasonal commuter practice began, as the Service's own brief shows, at the time the bracero system was ended in the early 1960's. While the daily commuter practice began in the 1920's, it was essentially then only an administrative convenience so that commuters did not have to obtain, and the Service did not have to issue, immigrant visas for each daily visit. Since there was no quota on Mexican nationals and no prohibition against them coming to this country because of a surplus of domestic labor, Mexican nationals could enter virtually without restriction. Consequently, the commuter system did not undermine any protection which had been afforded domestic labor. The daily commuter practice only had substantive content after 1952 when Congress passed Section 214(a) of the Act which prohibits the entry of immigrants who pose an economic threat to American labor. The commuter practice since that time and especially since a quota was imposed on Mexican immigrants in 1968 has allowed commuters to avoid these important provisions.

Fourth, the administrative practice is not consistent. We have seen that the Service has adopted a regulation directly inconsistent with the purported construction of the Act. The Department of Labor, which is equally involved in application of the immigration laws, has concluded that the commuter practice is illegal.

Fifth, there is no indication that Congress has ever approved the commuter system. While Congress did not adopt proposals to eliminate the system before 1952, there was little reason to end it at that time since the system only involved daily commuters and did not provide a

mechanism to undermine important statutory provisions designed to protect domestic labor. The only references to commuters in the legislative history of the Immigration and Nationality Act of 1952 are references in the Senate report which simply describe existing immigration practices. In 1952 and 1965, Congress tightened several provisions relating to the commuter practice for the purpose of protecting domestic labor. Since passage of the 1952 Act, Congressional leaders relating to immigration matters have repeatedly challenged the commuter system as in violation of law. Consequently, the history of the commuter practice and of Congress' response to it is, when considered most favorably from the standpoint of the Service, inconclusive.

B. Section 214(a) of the Act requires that commuters obtain a labor certificate before entering the United States. Section 214(a) applies to all immigrants who come within Section 101(a)(27)(A) which applies to "an immigrant who was born in an independent foreign country of the Western Hemisphere." Commuters cannot enter this country because the Secretary has found that the supply of domestic farm labor is sufficient and that the admission of farm laborers would adversely affect wages and working conditions of domestic workers. This construction of Section 214(a) is consistent both with its purpose to protect domestic labor and its legislative history showing that it applies to all workers entering this country. Moreover, the Board of Immigration Appeals has determined that Section 214(a) applies to commuters. *Matter of Bailey*, 11 I & N. 466, 471 (1965).

II

All seasonal commuters and those daily commuters who come to the United States only during the agricultural season are properly considered as non-immigrants.

A. Section 101(a)(15)(H) explicitly provides that "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor" is a non-immigrant. The only commuters who are properly considered as immigrants are those who come daily throughout the year. Any commuters covered by Subsection (H) could not enter the country since non-immigrants can not enter under that subsection unless the Secretary of Labor determines that "unemployed persons capable of performing such services or labor cannot be found in this country" and he has made no such finding as to agricultural labor. Contrary to the Service's position, there is nothing strange in concluding that the statute first defines temporary agricultural laborers as non-immigrants but then does not allow them to enter the United States when there is no shortage of domestic labor.

The application of Subsection (H) to commuters is confirmed by its legislative history. It was specifically designed to limit the entry of agricultural laborers. Both the Service and Department of Labor promised that, after the termination of the bracero program in 1964, Mexican farm laborers would have to enter the country as non-immigrants subject to the restrictions of Subsection (H). However, the Service has allowed, as its brief in this case admits, the continued entry of braceros as immigrants.

B. All seasonal commuters and those daily commuters who come to the United States only during the agricultural season should be reclassified by the Service as non-immigrants. It is clear that an alien's entry into this country must be legal each time he enters. Section 101(a)(20) specifically provides that an alien continues to be considered as lawfully admitted for permanent residence only as long as his status has not changed. Since commuters are not residents of this country, their status has changed and Subsection (H) applies.

III

The issue in this case should be resolved by the Court. While this case involves complex and important problems involving international relations, agricultural labor and the like, this Court need not and should not consider the policy issues suggested by the Service. Instead, the Court is simply called upon to exercise its customary responsibility to determine the meaning of a federal statute. The most persuasive indication of this meaning is of course the words of the statute itself.

ARGUMENT

I

COMMUTERS MUST HAVE AN IMMIGRANT VISA AND A LABOR CERTIFICATION FROM THE SECRETARY OF LABOR IN ORDER TO ENTER THE UNITED STATES

While we submit that most commuters are properly classifiable under the Immigration and Nationality Act as non-immigrants (see Part II, *infra*, pp. 73-90 below), the Immigration and Naturalization Service classifies them as immigrants. Stipulation, Gov. Pet. App. D, pp. 34-35. We assume in Part I of this brief that the Service is correct in classifying daily and seasonal commuters as immigrants. We contend that, on this assumption, plaintiffs were entitled to summary judgment on the first claim of their complaint because daily and seasonal commuters must have immigrant visas and labor certifications in order to enter the United States.

Immigrant aliens may not enter the United States without a valid immigrant visa (Section 211(a) of the Act, 8 U.S.C. 1181(a), unless they are "returning resident immigrants" (Section 211(b), 8 U.S.C. 1181(b)). An immigrant visa is issued for a period of four months and is surrendered upon entry. Section 221(c), (e), 8

U.S.C. 1201(c), (e). An immigrant visa may be obtained by an immigrant entering the United States to perform labor only if the Secretary of Labor has certified that there are not sufficient domestic workers to perform the labor and that his employment would not adversely affect the wages and working conditions of American domestic workers. Section 212(a)(14), 8 U.S.C. 1182(a)(14). Since the Secretary of Labor has determined that such a certification may not be made for agricultural labor (Schedule B, following 29 C.F.R. 60.6), commuters cannot obtain immigrant visas to enter the United States.

The Service has decided, however, that both daily and seasonal commuters come within Section 211 as "returning resident immigrants" and therefore do not need immigrant visas to enter the United States. Instead, the Service allows them to enter pursuant to Alien Registration Receipt Cards, commonly known as "green cards" (Form I-151). Stipulation, Gov. Pet. App. D, pp. 34-35. Since the Service requires no certification by the Secretary of Labor for commuters to continue to use green cards (Stipulation, Gov. Pet. App. D, p. 35), commuters continue to enter the United States to perform agricultural labor even though the Secretary has found that the entrance of immigrants to perform agricultural labor adversely affects the wages and working conditions of domestic workers. 29 C.F.R. 60.2(a)(2); Schedule B, following 29 C.F.R. 60.6.

A. Commuters Are Required To Obtain Immigrant Visas In Order To Enter The United States

1. *The Plain Language of the Immigration and Nationality Act and of the Regulations Require Commuters to Obtain Immigrant Visas*

As we have noted above, immigrant aliens may not enter the United States without valid immigrant visas,

unless they are "returning resident immigrants." Section 211(b) of the Act, 8 U.S.C. 1181(b). The Immigration and Nationality Act defines a returning resident immigrant as an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad." Section 101(a)(27)(B), 8 U.S.C. 1181(b). The regulations promulgated pursuant to and interpreting Sections 211 and 101(a)(27)(B) provide that an immigrant alien may enter the United States without an immigrant visa and pursuant to a green card only if he is "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad." 8 C.F.R. 211.1(b)(1). In order for the Immigration Service's practices to be sustained, they must be consistent with all these provisions of Federal statutes and regulations. In fact, we submit that the Service is violating each of them.

It is well established that statutes and regulations are to be interpreted according to their plain and ordinary meaning. *E.g., United States* v. *Temple*, 108 U.S. 97, 99 (1881); *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278, 280; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617-618 (1944). We submit that commuter aliens are clearly not "returning resident immigrants" of the United States; are not "lawfully admitted for permanent residence" or "returning from a temporary visit abroad"; and are not "returning to an unrelinquished lawful permanent residence in the United States."

a. *The Commuter Is Not a "returning resident immigrant" of the United States under Section 211(b) Because He Does Not Reside in This Country.* Section 211(b) allows immigrant aliens to enter the United States without immigrant visas if they are "returning resident immigrants." The Immigration and Nationality Act specifically defines "residence" to mean (Section 101(a)(33), 8 U.S.C. 101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that daily commuters have no "place of general abode" in the United States since they have no "dwelling place in fact" of any kind in this country. Those seasonal commuters, who have no permanent home in the United States which they retain when they are outside the country but have such a permanent home in Mexico, have their "principal, actual dwelling place in fact" in Mexico and are likewise not residents of the United States.

The Immigration Service does not contest that commuters reside in Mexico and not the United States. Both the Board of Immigration and Naturalization Appeals and Immigration Service define commuters as "persons who have their place of residence in foreign contiguous territory and commute daily to the United States to work." *In the Matter of L———*, 4 I. & N. 454, 455 (1951). Accord, *Matter of Flores-Maldonado*, 10 I. & N. 22 (1962); *Matter of Bustillos-Ruiz*, 10 I. & N. 60, 61-63 (1962); *Matter of Moore*, 13 I. & N. 711 (1971); Immigration and Naturalization Service, Operations Instructions, Section 211.3 (Nov. 28, 1973). In *Matter of Burciaga-Salcedo*, 11 I. & N. 665, 666 (1966), the Board of Immigration Appeals said that the Service treated "the commuter who obtained an immigrant visa as if he lived in the United States although he continued to live in the contiguous territory." Raymond F. Farrell, the Commissioner of the Immigration and Naturalization Service, told a subcommittee of the House Judiciary Committee only a year ago that the status of commuters is "really not that of a legal resident alien." Illegal Aliens, Hearings Before Subcommittee No. 1, House Judiciary Committee, 92nd Cong., 2d Sess. 1351 (1972). The General Counsel of the Service told the same subcommittee that

commuters "all obtained lawful admission for permanent residence, but they don't reside here." *Ibid.* The Service has defined a "seasonal worker or seasonal commuter" as "an alien lawfully admitted to the United States for permanent residence, who resides in a contiguous foreign country, who comes to the United States solely to perform seasonal work for extended periods * * *." Immigration and Naturalization Service, Responses to the Senate Subcommittee on Migratory Labor, p. 1-10, in Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2013 (1969).

Similarly, in *In Matter of C——— E———*, 7 I. & N. 599 (1957), the Board of Immigration Appeals determined that the residence of a Mexican national was in Mexico in a situation analogous to that of seasonal commuters. The alien frequently entered the United States both to work and visit relatives, sometimes for eight months at a time. The Board stated that the alien's stays in this country did not qualify as residence because he customarily lived in Mexico and, although he periodically came to the United States to work, his stays here were "temporary in nature." *Id.* at 600.

Moreover, commuters are not deemed to be residents of the United States for a variety of other purposes. Commuters, like other non-resident aliens, pay federal taxes only on income earned in the United States rather than on their total income. Staff Report of the United States Commission on Civil Rights, "The Commuter on the United States-Mexico Border," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 166-167 (1969). "[I]t has been held that a commuter cannot even become a citizen (the assumed purpose for

immigration under the Act) because, by definition, his assimilated status does not conform to the standard of residency (actual domicile in the United States) required by the Act for Naturalization." *Id.* at 166. See also pp. 89-90 below. Commuters cannot vote or hold office. S. Rep. No. 83, 91st Cong., 2d Sess. 63 (1969). A survey has shown that only 16.5 percent of commuters had served in the American armed forces in comparison to 94.4 percent who had served in the armed forces of Mexico. North, "The Border Crossers: People Who Live in Mexico and Work in the United States," prepared for the Manpower Administration, Department of Labor, pp. 205, 208 (April 1970).

The legislative history of Section 211(b) confirms that the phrase "returning resident immigrants" does not include daily or seasonal commuters. Prior to 1965, Section 211(b) included in the class of immigrants who could be admitted to the United States without an immigrant visa "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. In 1965, Section 211(b) was significantly narrowed by the adoption by Congress of its present wording of "returning resident immigrants." 8 U.S.C. 1181(b). This change supports plaintiffs' position that aliens must have visas unless they are actually residents of the United States and cannot merely have been admitted with the right to be residents.

The Committee Reports accompanying the 1965 amendments do not specifically discuss the reason for the change in the wording of Section 211(b). However, all of the 1965 amendments must be interpreted in the light of their stated purpose to provide (S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965); H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)):

> Safeguards to protect the American economy from job competition and from adverse working standards

as a consequence of immigrant workers entering the labor market.

The specific purpose of the amendment to Section 211 (b) becomes clear from the hearings conducted on "commuter workers" by the House Committee on Immigration and Naturalization prior to the 1965 amendments as part of a comprehensive study of population and immigration issues. Study of Population and Immigration Problems, Part II: The Mexican Farm Labor Problem [hereinafter Study of Population and Immigration Problems], House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11 (1963). The Committee questioned the legality of the commuter practice and its adverse impact on the American economy. *Id.* at 166. During the course of the hearings, the Immigration Service relied on the pre-1965 version of Section 211 of the Immigration and Nationality Act as the statutory basis for the commuter practice. L. Paul Winings, then General Counsel of the Service, insisted that it did not strain the language of Section 211(b) to call the commuter's absences from the United States "temporary departures," which under the then wording of Section 211(b) would have meant that no immigrant visa was required. *Id.* at 169. Walter Besterman, an authority on immigration law, who at the time of the 1963 hearings had been the Committee's legislative assistant for 17 years and who had been extremely influential in Congressional consideration of the 1952 Immigration Act, objected to this interpretation of the Act[7] (*id.* at 168-169):

> Is it your view of the very core of this problem that an immigrant who has not established permanent residence in the United States and is a commuter, in this class, is really complying with the law? Is his situation comparable to the status of the nonquota

[7] Besterman, as the record of the hearings demonstrates, was speaking on behalf of the Subcommittee. See *id.* at 166, 167.

> immigrant of the 101(a)(27)(B) class who is an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad?
>
> I am asking this question because you [Mr. Winings] mentioned earlier the situation of an immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family. That person would be, in my opinion, a returning immigrant when he comes back, regardless how often he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto.

Besterman ended the Committee's examination of the legality of the commuter practice by tersely stating, "I do not want to prolong that. I think the facts are before the Subcommittee." *Id.* at 169.

The Committee responded to the Immigration Service's statutory defense of the commuter practice by reporting a bill which replaced the phrase "aliens lawfully admitted for permanent residence who depart from the United States temporarily" with the phrase "returning resident immigrants." H.R. 2580, Sec. 9, in H. Rep. No. 745, 89th Cong., 1st Sess. 6 (1965). In 1965, Congress adopted this language in the Act. Under the new language, it was no longer enough that an alien had been admitted for permanent residence as all immigrants are. Instead, it was necessary for the alien actually to be a resident of the United States. Congress plainly intended by this amendment to prevent commuters from continuing to enter into the United States without meeting the requirements for obtaining immigrant visas whether or not they worked over six months in the United States.

The court below found that (Gov. Pet. App. A, p. 18):

> Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a

> foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work.

Since the Act defines residence as the "principal, actual dwelling place in fact, without regard to intent" (Section 101(a)(33), 8 U.S.C. 101(a)(33)), the court's findings should necessarily have led to the conclusion that neither daily nor seasonal commuters are "returning resident immigrants" under Section 211(b).

The court of appeals did conclude that "[t]he Service's practice [as to seasonal commuters] is in violation of the clear and plain language of the statute." Gov. Pet. App. A, p. 21. However, as to daily commuters, the court of appeals held (*id.* at 28):

> [T]he statutory language is not as plain and unambiguous as plaintiffs contend. Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. * * * Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

We submit that this reasoning could not be more totally inconsistent with the language of Section 101(a)(33), 8 U.S.C. 101(a)(33). A commuter's place of work

is obviously not "his principal, actual dwelling place in fact" as the Act requires. A commuter who has "a permanent commitment and interest" and "fraternal and cultural associations" in the United States does not have his "actual dwelling place in fact" in the United States as the Act requires. In relying upon the commuter's "commitment and interest" and associations the court below has plainly violated the Act's express language which states that residence must be decided "without regard to intent."[8]

Moreover, the court of appeals' position is inconsistent with the legislative history of Section 101(a)(33). The definition of residence received its present form in the Immigration and Nationality Act of 1952. 66 Stat. 120. Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." Section 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." The House Report accompanying H.R. 5678, which became the Immigration Act of 1952, stated that the definition of residence adopted by the 1952 Act was a codification of the construction of the term "residence" in *Savorgnan* v. *United States*, 338 U.S. 491 (1950). H. Rep. No. 1365, 82nd Cong., 2d Sess. 33 (1952).

The plaintiff in *Savorgnan* claimed that she had not lost her American citizenship because she had never in-

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[8] We also emphasize that there is no evidence in the record that commuters individually or generally have such commitment or interest of fraternal or cultural associations in the United States. We doubt that these facts exist for the large majority of commuters who have their homes and spend most of their time not merely in a different city or state from where they work but in a different country with a different language and culture. As indicated above (p. 23), it is significant that most commuters had served in the armed forces of Mexico rather than the United States.

tended to establish a permanent residence outside of the United States. The plaintiff had taken an oath renouncing her American citizenship, sworn allegiance to Italy, and lived in Italy with her Italian husband throughout World War II without retaining any abode in the United States. This Court held that Mrs. Savorgnan's residence during this period had been in Italy with her husband since residence under the Nationality Act of 1940 was the person's principal dwelling place regardless of intent (338 U.S. at 505-506):

> Under the Act of 1940, the issue is not what her intent was on leaving the United States, nor whether at any later time, it was her intent to have a permanent residence abroad or to have a residence in the United States. The issue is only whether she did, at any time between July 1941, and November 1945, in fact "reside" abroad. The test of such "residence" is whether, at any time during that period, she did, in fact, have a "principal dwelling place" or "place of general abode" abroad. * * * Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material. She expatriated herself under the laws of the United States by her naturalization as an Italian citizen followed by her residence abroad.

Finally, it is obvious that the daily commuter has even less ties to the United States than the seasonal commuter. The daily commuter has no dwelling place, no matter how temporary, in the United States. He comes only for a few hours at a time simply for employment. In contrast, the seasonal commuter comes for a number of months and has a temporary dwelling place here. He is, if anything, more likely to develop interests and associations in this country. Since, however, under both the clear language of the Act and its legislative history, seasonal commuters are plainly not residents of the United States

under Section 211(b), daily commuters are *a fortiori* not residents of the United States under this provision.

The Service contends (Gov. Br. 30-31) that Section 211(b) does not require commuters to be "returning resident immigrants" at all in order to enter the United States without an immigrant visa because that Section states that "returning resident immigrants, defined in section 101(a)(27)(B)" may enter without a visa. The Service argues that since Section 101(a)(27)(B), 8 U.S.C. 1181(a)(27)(B), applies to "an immigrant, lawfully admitted for permanent residence, who is returning for a temporary visit abroad," the alien need but only be admitted for permanent residence and need not be a resident. We submit that the Service's interpretation would read the phrase "returning resident immigrants" entirely out of Section 211(b). If Congress intended the Service's interpretation, there can be no reason for having used the term "returning resident immigrants." Congress could have easily used the phrase "special immigrant" since Section 101(a)(27)(B) defines that term. Instead, Congress chose to provide that only "returning resident immigrants" could avoid the requirement of an immigrant visa.

Even if, however, the phrase "returning resident immigrants" is not an independent requirement which aliens must meet to come within Section 211(b), it is, at the very least, persuasive as to the meaning Congress intended in Section 101(a)(27)(B). We contend below (pp. 30-36) that Section 101(a)(27)(B) applies only to residents of the United States because the status of immigrants who do not become residents has changed and because non-residents are not returning from a temporary visit abroad when they seek to enter this country. Accepting *arguendo* the Service's position, Congress has stated in Section 211(b) that the phrase "returning resident immigrants" is defined in Section 101(a)(27)(B).

Therefore, in the absence of any indication to the contrary, Congress must be presumed to have intended the words of Section 101(a)(27)(B) to apply only to "resident immigrants." It would be strange indeed for Congress to define "returning resident immigrants" to include non-residents. We submit therefore that Section 211(b) shows that Congress, like the plaintiffs, considered the language of Section 101(a)(27)(B) essentially the equivalent of "returning resident immigrants" and therefore that Section 101(a)(27)(B) cannot be satisfied unless the alien is a resident of the United States.

b. *The Commuter Alien Is Not "lawfully admitted for permanent residence" or "returning from a temporary visit abroad" Under Section 101(a)(27)(B) When He Reenters the United States.* Commuter aliens should not be permitted to enter the United States without an immigrant visa because they are neither "lawfully admitted for permanent residence" nor "returning from a temporary visit abroad" as required by Section 101(a)(27)(B) of the Act, 8 U.S.C. 1101(a)(27)(B).[9]

First, Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), explicitly defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."[10]

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[9] The *amicus curiae* brief of Bud Antle, Inc., argues that no distinction can be made between citizens and permanent resident aliens on the one hand and non-resident aliens on the other hand as to their rights to enter the United States. Such a contention would mean that 8 U.S.C. 1101(a)(27)(B) was unconstitutional. The *amicus* cites no cases even suggesting that Congress cannot provide for separate regulation concerning the entry of non-resident aliens into the United States. We submit that the constitutionality of such separate regulation is obvious.

[10] See pages 87-88 below for further analysis of the meaning of Section 101(a)(20).

However, the status of commuters has changed. While they were admitted for permanent residence, they either never assumed residence in the United States or subsequently abandoned that status. As we have described above (pp. 21-22), the Immigration Service concedes, that commuters are not residents.

Moreover, the Service's construction of Section 101(a)(20) makes no sense in the context of the statute. "Lawfully admitted for permanent residence" is defined in Section 101(a)(20) not only for purposes of Section 101(a)(27)(B) but for several other provisions of the statute. The Act provides that the Attorney General may grant a waiver of the Act's prohibition against entry of aliens who have been convicted of a crime or procured entry documents by fraud if the alien is the spouse, child or parent of a citizen or of an alien "lawfully admitted for permanent residence" (8 U.S.C. 1182(h), (i)); that an alien worker seeking to enter the country as a special immigrant must receive Department of Labor certification that there are not sufficient domestic workers to perform this labor and his employment would not adversely affect wages of American laborers, unless he is the parent, child or spouse of a citizen or of an alien "lawfully admitted for permanent residence" (8 U.S.C. 1182(a)(14)); a spouse or unmarried child of an alien "lawfully admitted for permanent residence" is entitled to a second preference visa (8 U.S.C. 1153(a)(2)); and a spouse, parent, or child of a citizen or of an alien "lawfully admitted for permanent residence" may not be deported because he procurred entry by fraud (8 U.S.C. 1251(f)). All these provisions are reasonable if an alien lawfully admitted for permanent residence means an alien who is actually a permanent resident of this country. But it is incredible to believe that those special privileges given to relatives of United States citizens or of permanent resident aliens were also intended to apply

to relatives of aliens who are residents of a foreign country and simply work in the United States.

Furthermore, two other sections of the Act strongly suggest that "lawfully admitted for permanent residence" does not include commuters. The Act provides for the admission of otherwise excludable aliens who are the spouse, parents or unmarried children of "a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa." 8 U.S.C. 1182(g). If the Service is right, that all aliens with immigrant visas are lawfully admitted for permanent residence, the last phrase is superfluous. Similarly, the Act provides that a border crossing identification card is to be issued to "an alien who is lawfully admitted for permanent residence or to an alien who is a resident in foreign contiguous territory." 8 U.S.C. 1101(a)(6). Again, this indicates that Congress distinguished between commuters who reside in foreign contiguous territory and aliens lawfully admitted for permanent residence. In short, as the court of appeals held, "the construction of 'lawfully admitted for permanent residence' as including commuters 'makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act, entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others.'" Gov. Pet. App. A, p. 21.

The Service's only response (Gov. Br. 28) to the incongruity—to say the least—of its interpretation of "lawfully admitted for permanent residence" when applied to other provisions of the Act is that these issues need not be resolved in this case. It then states that "[t]he interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections." *Ibid.* The Service is thus suggesting that the words "lawfully admitted for permanent residence" may have different meanings in different parts

of the Act. However, this phrase has been carefully defined by Congress in Section 101(a)(20) for purposes of the entire Act. Section 101(a) begins by specifically stating that "as used in this chapter," each of the phrases has the meaning set forth in that Section. Moreover, the House Report stated that this term has special significance because of its application to numerous provisions of the Act. H. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952). Consequently, this phrase must be interpreted in a manner which makes sense for all its applications.

Second, the phrase "returning from a temporary visit abroad" clearly means an absence from, and a subsequent return to, a more permanent place. Since the commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is not from the United States to Mexico but from Mexico to the United States. When the commuter returns to his permanent home in Mexico, he is hardly making a temporary visit abroad.

L. Paul Winings, then General Counsel of the Immigration and Naturalization Service, conceded in 1963 before the House Committee on Immigration and Naturalization that the ordinary meaning of "visit" in the phrase "temporary visit abroad" was an absence from a more permanent place. "One thinks of a visit as being, I presume, something away from a more permanent place." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 169 (1963). Winings claimed that the Service's approval of the commuter practice did not rely on Section 101(a)(27)(B) of the Act which referred to "a temporary visit abroad" but rather to the phrase in Section 211(b) referring to "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. That

Section, however, as we have seen (pp. 24-25 above), was changed by Congress to remove the very language upon which the Service relied and to refer to Section 101(a)(27)(B). In any event, by the Service's own admission, Section 101(a)(27)(B) provides no basis for allowing commuters to enter the United States without a visa.

Moreover, the phrase "returning from a temporary visit abroad" has been part of immigration law describing non-quota aliens since the first Immigration Control Act of 1921. Section 2(d), 42 Stat. 5, 6. It was incorporated in the Immigration Act of 1924 (Sec. 4(b), 43 Stat. 153) and in Section 101(a)(27)(B) of the present Immigration Act of 1952 using precisely the same language. The Secretary of Labor interpreted "temporary visit abroad" in the Immigration Rules of 1924 (Rule 9, Subdivision G):

> A "temporary visit abroad" as used in subdivision (d) of section 2 of said Act of May, 1921, as amended shall be construed to mean an absence in any foreign country *without relinquishment of domicile* for a period not exceeding six months. (emphasis added)

This interpretation of "temporary visit abroad" has been approved repeatedly by the federal courts. *Transatlantica Italiana* v. *Elting*, 66 F.2d 542, 545 (C.A. 2, 1933); *United States* v. *Day*, 21 F.2d 307, 308 (C.A. 2, 1927); *International Mercantile Marine Co.* v. *Elting*, 67 F.2d 886, 889 (C.A. 2, 1933); *Hurst* v. *Nagle*, 30 F.2d 346, 347 (C.A. 9, 1929), certiorari denied, 279 U.S. 861; *United States ex rel. Katric* v. *Reimer*, 25 F. Supp. 925, 926 (S.D. N.Y., 1938); *United States* v. *Parisi*, 24 F. Supp. 414, 417 (D. Md., 1938); *Serpico* v. *Trudell*, 46 F.2d 669, 670 (D. Vt. 1928) (alien retained "an actual home" in the United States which was "more than a retention of domicile)." For example, in *Transatlantica Italiana* v. *Elting*, *supra*, 66 F.2d at 545, Judge Learned

Hand stated that "[i]t is not clear as an original question that the phrase, 'returning from a temporary absence abroad,' implies that the alien must have acquired a domicile here, not relinquished during his absence. It is certainly possible to read the language as meaning no more than the alien had resided here, meant to come back when he left, and did not change his mind while absent." Thus, Judge Hand found that the language alone required domicile or at least residence in the United States. He then stated, based on the interpretation of the statutory language by the Secretary of Labor, that "the returning alien must have been domiciled and retained his domicile" in the United States. *Ibid.*

Similarly in *International Mercantile Marine Co.* v. *Elting*, two immigrant aliens who had previously been admitted for permanent residence to the United States and had resided in this country sought readmission as immigrants "returning from a temporary visit abroad." The court of appeals held that the aliens could not be readmitted to the United States as immigrant aliens returning from a temporary visit abroad because they did not have unrelinquished domiciles in this country (67 F.2d at 889):

> [T]hey were not temporary visitors abroad, but had relinquished their domicile in this country.
>
> They were clearly quota immigrants, although they had formerly resided in this country. They had given up their domiciles here and were not returning from a temporary visit abroad.

In the treatise on immigration law co-authored by the present general counsel of the Immigration Service, the authors, citing *International Mercantile Marine Co.* v. *Elting*, state that the legal criteria for whether an alien is "returning from a temporary absence abroad" is "whether the alien intended to abandon his residence in

the United States." 1 Gordon and Rosenfield, *Immigration Law and Procedure*, Sec. 2.19 (rev. ed., 1973).

Whether one accepts the judicial requirement of an "unrelinquished domicile" or Gordon and Rosenfield's "unrelinquished residence," neither the daily nor seasonal commuter is returning from a temporary visit abroad when he enters the United States. No commuter alien has a domicile in this country. "Domicile" means a man's permanent home to which, whenever he is absent, he has the intention of returning. *Matter of C——*, 1 I. & N. 631, 633-635, 640 (1943); *Matter of S——*, 1 I. & N. 646, 649 (1943); Kennan, Kossuth, and Kent, *A Treatise on Residence and Domicile*, p. 33 (1934). The presumption of the law is against a change of domicile. *Matter of C——*, *supra*, 1 I. & N. at 635. In order to effect such a change an individual must establish a residence in a new domicile and intend to remain there permanently. *Gilbert* v. *David*, 235 U.S. 561, 590 (1915); *Mitchell* v. *United States*, 88 U.S. 350, 353 (1874); *Matter of C——*, *supra*, 1 I. & N. at 635, note 8. Whether the commuter comes for daily or seasonal intervals, his domicile or home, just like his residence, remains in Mexico.

c. *The Commuter Alien Is Not "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" Under the Immigration Service's Own Regulations.* Prior to the Immigration and Nationality Act of 1952, the Service's regulations explicitly considered daily commuters as immigrants. Immigration Rules of January 1, 1930, Rule 3, Subdivision C, Para. 1. All mention of commuters, however, was eliminated after passage of the 1952 Act. Compare 17 Fed. Reg. 11483 (Dec. 19, 1952), with 8 C.F.R. 110.6 (1947 Supp.). This change at least implicitly supports our contention that the commuter practice is inconsistent with the Act.

Subsequently, the Immigration and Naturalization Service promulgated regulations pursuant to Sections 211 and 101(a)(27)(B) of the Immigration Act (8 U.S.C. 1181 and 1101(a)(27)(B)), which define those persons who are permitted to use Alien Registration Receipt Cards, usually called "green cards." This regulation provides (8 C.F.R. 211.1(b)(1)):

> In lieu of an immigrant visa, an immigrant alien returning to an *unrelinquished lawful permanent residence in the United States* after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *. [emphasis added]

This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" — was no mere inadvertance. It is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2.

The requirement of an unrelinquished lawful permanent residence in the United States first appeared in the regulation in 1957. 22 Fed. Reg. 6377. Previously, the regulation permitting entry without an immigrant visa stated (21 Fed. Reg. 832):

> Immigrants of the following described classes applying for admission to the United States need not present visas and passports:
>
> "(c) Aliens of the following described classes who have been lawfully admitted for permanent residence and who are returning after a temporary absence:
>
> "(1) An alien who is returning to the United States after a temporary absence of not more than six months, only in some point or place in North, Central or South America, or the places named in Section 101(b)(5) of the Act, and who present a form I-151 duly issued to him.
>
> (2) An alien who is returning from a temporary visit abroad and who presents a valid unexpired reentry permit.

Thus, the new regulation retained the earlier requirement that the alien was returning from "a temporary absence." However, the new regulation replaced the requirement that the alien be "lawfully admitted for permanent residence" with the much stronger and more explicit requirement that he have "an unrelinquished lawful permanent residence in the United States."

As we have seen (pp. 21-22), the Immigration Service has acknowledged that daily and seasonal commuters do not have residences in the United States. They even more plainly do not have "unrelinquished" and "permanent" residences in this country. Daily commuters do not have residences at all in the United States, let alone unrelinquished or permanent ones. Seasonal commuters plainly do not have unrelinquished and permanent residences since any residences they might have are abandoned when they return to their permanent residences in Mexico at the end of the agricultural season. Moreover, the requirement that the residence be unrelinquished makes clear that even commuters who originally were actual residents of the United States but who gave up these residences to become commuters can not use green cards to work in the United States.

The Service makes no serious effort (see Gov. Br. 35-36) to reconcile the language of 8 C.F.R. 211.1(b)(1) with its position. Instead, it states that "[w]hile the regulations could be more artfully drafted, the phrase 'unrelinquished lawful permanent residence' is meant to signify the unrelinquished *status* of an alien who has been granted the privilege of residing permanently in the United States" (emphasis in original). However, this tortured reading is directly inconsistent with the language. The regulation plainly requires unrelinquished *residence* and not unrelinquished status, which is precisely plaintiffs' construction of both the Act and the regulation.

Thus, neither daily nor seasonal commuters come within 8 C.F.R. 211.1(b)(1). As a result, commuters cannot use green cards to enter the United States for three distinct reasons.

First, the regulation, 8 C.F.R. 211.1, is an administrative interpretation of Section 211(b). Since this interpretation is consistent with the plain meaning of the statute it persuasively confirms this meaning.

Second, even if daily and seasonal commuters were "returning resident immigrants" under Section 211(b) and "immigrant[s], lawfully admitted for permanent residence, who [are] returning from a temporary visit abroad" under Section 101(a)(27)(B), commuters must still come within 8 C.F.R. 211.1 in order to enter the United States without an immigrant visa.

The Act allows aliens to enter the United States without immigrant visas only pursuant to regulations of the Attorney General. Section 211(a) of the Act, 8 U.S.C. 1181(a), requires, except as provided in Section 211(b), all immigrant aliens to have immigrant visas in order to enter the United States.[11] Section 211(b) makes an exception to Section 211(a) by stating that the Attorney General may admit "returning resident immigrants" without immigrant visas.

Part 211 of 8 C.F.R. is headed "Documentary Requirements: Immigrants; Waivers." Subsection (a) of 8 C.F.R. 211.1 requires that "a valid unexpired immigrant visa shall be presented by each arriving immigrant alien applying for admission to the United States for lawful permanent residence * * *." Subsection (b) then makes an exception for "an immigrant alien returning to an unrelinquished lawful permanent residence" to allow such an alien to use a Form I-151 in lieu of an immigrant visa.

[11] Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20), also makes immigrant aliens without immigrant visas excludable.

The Service has never pointed to any other regulation which would allow commuters to enter the United States without immigrant visas. Therefore, if commuter aliens do not come within 8 C.F.R. 211.1(b), they are prohibited by both the Act and the regulations from entering the United States without an immigrant visa.

Third, even if immigrant aliens are not required by statute to possess immigrant visas to enter the country, they can only use a green card if they comply with restrictions on its use. The Attorney General created the green card administratively in 8 C.F.R. 211.1(b) and he can restrict it. Indeed, Section 211(b) specifically provides that when the Attorney General does allow "returning resident immigrants" to enter without immigrant visas, he shall do so "under such conditions as may be by regulations prescribed." Here, the conditions clearly prohibit the use of green cards by commuters. This Court has held that "a regulation * * * should not be disregarded or annulled unless * * * it is plainly and palpably inconsistent with law" (*Boske* v. *Coningore*, 177 U.S. 459, 470 (1900)) and that valid regulations are binding upon federal agencies unless and until they are changed (*Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 540 (1959)). We therefore submit that commuters cannot use green cards in direct violation of the applicable and enforceable regulations.

2. *The Admission of Commuters Without Visas Cannot Be Justified on the Ground of Administrative Practice or Congressional Reenactment*

a. *Administrative Practice and Congressional Reenactment Cannot Be Used to Contradict the Clear and Unambiguous Language of the Act.* The Service's principal argument (Gov. Br. 39-63) is that the commuter system has gained legitimacy through administrative practice and Congressional reenactment. A contemporaneous

construction of an ambiguous or doubtful statutory provision by an administrative agency is of course entitled to weight. *Sanford's Estate* v. *Commissioner*, 308 U.S. 39, 52 (1939); *Houghton* v. *Payne*, 194 U.S. 88, 100 (1904). But an administrative practice, however long continued and consistently applied by successive administrative officers, must yield to the language of the statute. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1924); *Houghton* v. *Payne*, *supra*, 194 U.S. at 99-100; *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740, 759 (1931); *Koshland* v. *Helvering*, 298 U.S. 444, 447 (1936). "[T]he courts are the final authorities on issues of statutory construction * * * and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 211, 272 (1968). In other words, if the administrative construction of the statute is erroneous, it is, of course, not controlling. *Houghton* v. *Payne*, *supra*, 194 U.S. at 100.

Similarly, "where the law is plain, the subsequent reenactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938). See also, *e.g.*, *Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227, 237 (1873); *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 280 (1929); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740, 757, 759 (1931). As this Court held in *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118, 141 (1941), "[t]here is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words."

In short, as the Supreme Court has repeatedly held, the plain meaning of a statute is controlling. "That a

law is the best exposition of itself * * * [is] among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." *Pennington* v. *Coxe*, 6 U.S. (2 Cranch) 34, 52-53 (1804). See also, *e.g.*, *United States* v. *Missouri Pacific R.R. Co.*, *supra*, 278 U.S. at 278; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935). Where the words are clear and unambiguous, no other sources for judicial interpretation are necessary or appropriate.

As we have seen (pp. 20-36), the Service's practice of admitting commuters with green cards is clearly inconsistent with the language of at least two provisions of the Immigration Act. Indeed, it is not an attempt to construe statutory provisions at all but is admittedly an administrative invention. See pp. 45-47 below. Instead of being a construction of a statute, it was designed to avoid statutory restrictions because of the Service's belief that they were inappropriate.

Furthermore, even if some doubt existed concerning Sections 211(b) and 101(a)(27)(B), this doubt must be resolved in the light of their purpose. It is a well-established rule that, when a statutory provision requires interpretation, it should be interpreted in the light of its purpose (*Gayle* v. *Wilder*, 51 U.S. 477, 496 (1850)):

> It is not by detached words and phrases that a statute ought to be expounded. The whole act must be taken together, and a fair interpretation given to it, neither extending nor restricting it beyond the legitimate import of its language and its obvious policy and object.

See also, e.g., *Helvering* v. *N.Y. Trust Co.*, 292 U.S. 455, 464-465 (1934); *Richards* v. *United States*, 369 U.S. 1, 11 (1962).

One of the principal purposes and objects of the Immigration and Nationality Act of 1952 and its 1965

amendments, like all earlier immigration acts, was to protect American labor. The Supreme Court in *Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231, 243, 244 (1929), emphasized the long existing Congressional policy of protecting American labor through the immigration laws:

> The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points out clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. * * * The report of the House Committee to accompany the bill which afterwards became the Act of 1924, now under consideration (H. of R. Report 350, 68th Cong., 1st Sess.) likewise makes clear that protection of American labor was one of the controlling reasons for further restriction of immigration.

Congress was particularly concerned about aliens who were coming to the United States not to take up residence but to exploit the country's labor opportunities at the expense of domestic American workers (*id.* at 244):

> In the Senate report upon the same bill (S. Report 17, 67th Cong., 1st Sess. p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment.

The steps taken in the last two decades to control immigration have shown an even stronger purpose to protect American labor. The Immigration and Nationality Act of 1952 and the 1965 amendments reaffirmed the earlier Congressional policy:

> "While the bill [the Immigration and Nationality Act of 1952] will remove the 'contract labor clauses' from the law, it provides strong safeguards for

American labor." H. Rep. No. 1365, 82d Cong., 2d Sess. 50 (1952).

"Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened." S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965).

Consequently, Congress in Sections 101(a)(15)(H) and 212(a)(14), 8 U.S.C. 1101(a)(15)(H) and 8 U.S.C. 1182(a)(14), added new provisions to give this protection. These sections allow non-immigrants and immigrants, respectively, to enter the United States only if there is no surplus of domestic labor in their categories of employment. These provisions on their face have as their purpose the protection of American labor. As the court stated in *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 119 (D. D.C., 1969), Section 212(a)(14), "with § 101(a)(15)(H), was newly designed by the 1952 act in order to assure 'strong safeguards for American labor.'" And the recent quota on immigration from the Western Hemisphere provided in the 1965 amendments and implemented in 1968 (Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921) further evidences the Congressional awareness and concern over the influx of laborers from Mexico and other Western Hemisphere nations.

Both the language and purpose of the Immigration and Nationality Act are consistent in attempting to protect American labor from commuter aliens who pose a serious economic threat. In light of this strong and clear policy of protecting American laborers from competition with foreign workers through the immigration laws, there is no basis for a strained interpretation of the Immigration and Nationality Act to allow foreign nationals to enter the country to work.

b. *The Service's Alleged Administrative Practice Has Admittedly Been Invented Without Support in Applicable Federal Statutes.* As we have seen (pp. 21-22 above), the Immigration Service admits that commuters are not residents of the United States. Moreover, officials of the Service have been frank in admitting that the commuter practice was an administrative invention. Charles Gordon, the present General Counsel of the Immigration Service and co-author of an authoritative text on immigration law, calls the commuter status "a device of convenience," "never specifically * * * authorized by statute." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 181-182 (1969). Mr. Gordon uses the phrase "amiable fiction" to describe the anomalous situation of the commuter. *Id.* at 181, 186; Immigration and Naturalization Service Regional Office Operations, Part 1, Hearings before a Subcommittee of the House Government Operations Committee, 93rd Cong., 1st Sess. 95 (1973).[12]

Similarly, Gordon and Rosenfield in their treatise on immigration law state (1 *Immigration Law and Procedure*, Sec. 2.86 (rev. ed. 1973):

> Where this employment (of Mexicans and Canadians) is permanent in character administrative ingenuity has devised a "commuter" status, which enables the Canadian or Mexican to obtain lawful admission for permanent residence in order that he may be able to pursue his employment here, and his right to enter each day is attested by his alien registration receipt card. Of course, this device is an amiable fiction, since the commuter is coming temporarily

[12] The hearings use the phrase "amiable fixation" which is undoubtedly a typographical error.

> and usually returns to his home in Canada or Mexico each night.

Subsequently, in their 1973 supplement (Sec. 2.19), the authors again admit that since commuters "reside in adjacent countries," "the practice does not fit precisely within the statutory pattern * * * [and] does involve some logical inconsistency."

The Board of Immigration Appeals has likewise stated that (*Matter of M—— D—— S——*, 8 I. & N. 209 (1958)):

> The commuter situation manifestly does not fit into any precise category found in the immigration statutes. The status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors.

In *Matter of H—— O——*, 5 I. & N. 716, 719, note 13 (1954), the Board referred to "the fiction of a commuter's permanent residence coinciding with his place of employment * * *." In *Matter of Hoffman-Arvayo*, 13 I. & N. 750, 752, note 2 (1971), the Board said that commuters could use green cards to enter the United States "based upon the fiction that their presence in the United States while employed amounts to permanent residence in the United States." Accord, *Matter of L——*, 8 I. & N. 643, 646 (1960); *Matter of J—— P——*, 9 I. & N. 591, 593-594 (1962); *Matter of Burciaga-Salcedo*, 11 I. & N. 665, 667 (1966); *Matter of Gerhard*, 12 I. & N. 556, 557 (1967). And in *Cermeno-Cerna* v. *Farrell*, 291 F. Supp. 521, 529 (N.D. Cal., 1968), the court reiterated that the commuter status was a "fiction" which has "no statutory or constitutional status."

In short, the Immigration and Naturalization Service freely admits that the commuter practice was not authorized by any statute but was simply invented and continued to meet a need which the Service believes exists. The Service's lengthy brief significantly omits even any

mention of these admissions that the statute itself does not authorize the commuter practice.

c. *The Commuter Practice Is Not Supported by Long, Clear, and Consistent Administrative Practice.* Even if the language of the statute were less plain and required interpretation, and even if the administrative practice were solidly based on the wording of the statute, the administrative practice here gives little support to the Service's position. An administrative practice is entitled to weigh in construing an ambiguous statute only if it is consistent, clear, and of long duration. *Iselin* v. *United States*, 270 U.S. 245, 251 (1945); *Helvering* v. *Hallock*, 309 U.S. 106, 120, note 7 (1941); *United States* v. *Missouri Pacific R. Co.*, *supra*, 278 U.S. at 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16, 20-21 (1932). The commuter system does not meet these criteria.

(i) The commuter system is, as we have seen (pp. 36-40), directly inconsistent with the Service's own regulations. 8 C.F.R. 211.1(b)(1). Such regulations constitute the highest administrative authority. They are published in the Federal Register. Section 211.1(b)(1) constitutes the Service's reasoned judgment as to the meaning of Section 211(b) of the Immigration and Nationality Act which specifically authorizes the Service to promulgate regulations providing conditions for the entrance of immigrants without immigrant visas. These regulations are legally binding until changed. *Service* v. *Dulles*, *supra*, 354 U.S. at 388; *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 539-540. The fact that these regulations have not been enforced merely demonstrates that the Service has illegally refused to follow its own regulations as well as the applicable statutes.

(ii) The commuter practice is not of long duration in any meaningful sense. As the court below outlined (Gov. Pet. App. A, pp. 24-26), while the daily commuter practices began in the 1920s (see Appendix B, pp. 98-102 be-

low), prior to the adoption of the Immigration and Nationality Act of 1952, the practice was of little substantive significance. Since there was no quota on Mexican nationals and no prohibition against immigrants or nonimmigrants coming to the country because of a surplus of domestic labor in their field of employment, Mexican nationals were entitled to enter the country as immigrants virtually without restriction. However, if daily commuters had been required to obtain a new document for every entry into the country, this would have imposed a heavy burden on both the immigrant and the Service. The commuters could presumably have obtained such a document if he went to the trouble of applying for one for every working day and the Service went to the trouble of processing every application. Consequently, the commuter practice was actually only an invention to meet a severe administrative problem.

L. Paul Winings, then General Counsel of the Service, has described how the Service "devised" the status (Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 178 (1963)):

> In studying the problem at that time [after the passage of the Immigration Act of 1924] the immigration authorities concluded that Congress had not intended to interfere with the established pattern of regular border crossing by workers from adjacent countries who commuted to jobs in the United States. Such aliens, almost without exception, could obtain immigrant visas without difficulty. But they would be faced with an impossible task if they were required to obtain a new visa for each daily reentry. Therefore, the immigration authorities devised a border-crossing identification card which could be obtained by aliens who frequently crossed the international boundary.

In short, prior to 1952, the daily commuter practice did not give the commuter any substantive rights to enter which he did not have under immigration law.

In sharp contrast, the continuation of the daily commuter system after 1952 for the first time directly undermined substantive protections designed by Congress to protect American labor. In 1952, Congress provided that immigrants could not enter the United States if the Secretary of Labor found that an economic threat to American labor would result. 66 Stat. 183. In 1965, Congress strengthened this provision to forbid immigrants to enter the United States unless the Secretary of Labor determined that no threat existed. Section 212 (a) (14) of the Act, 8 U.S.C. 1182(a) (14). And in 1968 a quota was for the first time imposed on immigrants from Mexico. Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921.

The commuter system undermines those protections. It allows Mexican aliens to continue to enter the United States indefinitely even though they constitute an economic threat to American labor. They can continue to come although Congress has imposed a quota to limit entry of Mexican and other Western Hemisphere nationals.

While the daily commuter system started in 1924 and became legally significant in 1952, the Service has admitted that the seasonal commuter system did not even begin until after the end of the bracero program in 1964. The bracero program, which had been begun in 1943, allowed Mexican nationals to enter the United States to work during the agricultural season. The bracero program, as it existed on the eve of its termination in 1964, had many safeguards to protect American labor. The Secretary of Labor determined wages and set standards for working and living conditions under which the bracero would be employed. In addition, no Mexican farm-

workers could be brought into the United States until the Secretary of Labor had determined and certified that (*Report of the Select Commission on Western Hemisphere Immigration*, p. 92 (1968):

> (1) Sufficient domestic workers, able, willing and qualified, were not available at the time and place needed to perform the work for which such braceros were to be employed;
>
> (2) The employment of such workers would not adversely affect the wages and working conditions of domestic workers similarly employed; and
>
> (3) That reasonable effort had been made to attract domestic workers for such employment at wages and conditions comparable to those offered to braceros.

Despite the protective features of the bracero program, there was a growing concern in the country over the adverse impact of the bracero program on domestic labor. See Statement of President Kennedy signing the final extension of the bracero program in 1961 in Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, 41 (1963); Report of the Secretary of Labor, "Year of Transition, Seasonal Farm Labor—1965," pp. 1-2, Appendix H-1, H-2 (1965). As a result, Congress refused after 1964 to allow the program to continue. It intended, as we will see below (pp. 79-81), to protect American labor from low-priced foreign competition and to require that the future entry of Mexican nationals for farm work be governed by the provisions applying to nonimmigrants under Section 101(a)(15)(H)(ii).

When farmers in the southwestern United States saw that the end of the bracero program was near, they obtained immigrant visas for many of their Mexican workers. Thus, when the bracero program came to an end in 1964, many ex-braceros, now nominally permanent resi-

dent aliens, started entering the country as seasonal commuters in the spring, following the crops through various parts of the country and returning to their permanent residences in Mexico at the end of the harvest season. Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues" in *Report of Select Commission on Western Hemisphere Immigration*, p. 104 (1968); Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 73 (1969).

In order to allow the ex-braceros to enter the country, the Immigration Service, as it has unabashedly admitted, created a new class of commuters after 1964 to allow them to enter as seasonal workers. James S. Hennessy, the executive assistant to the Commissioner of the Service, testified before a House committee in 1969 (*id.* at 70, 73):

> A new class has come into being whom I would call the seasonal worker, a person who comes into the United States, for instance, at the opening of a growing season, has moved north as the crops mature; and at the end of the growing season, he has returned to Mexico.
>
> * * * *
>
> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

More recently in response to written interrogatories posed by the Senate Subcommittee on Migratory Labor, the Service described the seasonal commuter as follows (Immigration and Naturalization Service, Responses to the Senate Subcommittee on Migratory Labor, pp. 1-10, in Hearings on Migrant and Seasonal Farmworker Power-

lessness; Part V: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2022 (1969)):

> The seasonal worker or seasonal commuter is a relatively new concept under the immigration laws. It developed after the end of the bracero program in 1964 * * *.

In creating this new class, the Immigration Service had to flagrantly ignore Section 101(a)(15)(H) which was designed to provide non-immigrant status for aliens entering the country for temporary employment. See pp. 74-76 below.

In addition, the Service had to change one of its standards concerning commuters to accommodate the new seasonal commuter. Prior to 1965, it had been the position of the Immigration Service that "an alien is entitled to commuter status only if he has a permanent and stable job in this country." Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues," in *Report of the Select Commission on Western Hemisphere Immigration*, pp. 103, 105 (1968); *Matter of L——*, 8 I. & N. 643 (1960). The Immigration Service has stated that ("Commuters—Historical Background, Legal Challenges and Issues," *supra*, p. 105):

> It had been the position of the Service that a commuter must engage in employment which is "permanent and stable" in order to maintain his status. If that test were applied to the employment of the above workers [seasonal commuters], many would lose their status.

However, in 1965, the Immigration Board of Appeals changed the requirement to "regular and stable" employment and interpreted that phrase loosely to allow the entrance of seasonal commuters. *Ibid.; Matter of Bailey,*

11 I. & N. 466 (1965). Thus, as the court below concluded (Gov. Pet. App. A, p. 30):

> As to the post-1964 practice of the Service in regard to seasonal commuters, it is only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

The Service objects (Gov. Br. 70-74) to the determination of the court of appeals that the Service created a new class of commuters in 1964 to replace the bracero program. However, the Service's own detailed history of the end of the bracero program supports the basic conclusion of the court below that the large majority of seasonal commuters were formerly braceros who converted to commuter status in the early 1960's. Indeed, the Service's history goes further and shows (Gov. Br. 71-72) that this conversion in status was done pursuant to the encouragement of their employers who decided to protect their supply of labor at a time when the bracero program was being terminated because of its abuses. In any event, whether the seasonal commuter program originated in 1964 or 1960, it is undisputed that it is of recent origin. There can therefore be no contention that it is supported by a long and consistent administrative practice.

As a result of the Immigration Service's broadening of the commuter concept, the commuter is no longer a threat simply to our border communities. The daily commuter can work only within a few hours automobile drive of the border. The seasonal commuter has now entered the migrant stream in areas far inland in competition with one of this country's most depressed and economically deprived work force.

(iii) Finally, the statutes involved in this case are not the sole responsibility of the Department of Justice and the Immigration and Naturalization Service. As we have seen, the immigration laws have as a primary purpose the protection of American labor, a responsibility of the Department of Labor. The Secretary of Labor, not the Department of Justice, was explicitly given the authority by Congress to determine whether immigrant aliens would be prohibited from entry because they would compete for jobs with domestic workers. Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14).[13] It is therefore fair to consider the position of both the Department of Labor and Department of Justice in construing a statute so integrally related to the work of both departments.

The Department of Labor has strongly condemned the commuter practice. Former Secretary of Labor Willard Wirtz and other high-ranking members of the Department testified before Congressional committees that the commuter practice contradicts the language and the intent of immigration law. Hearings on Migrant and Seasonal Farmworker Powerlessness, Part 5, *supra*, pp. 2529-2548; Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 12, 20, 24, 33, 34 (1967). As Secretary Wirtz described the commuter practice (*id.* at 12):

> We are talking about a problem that exists only because it is covered by such a bramblebush of confusion and lack of understanding that the country does not know about [it]. We are talking about a situation that could best be described, if word would go out from this hearing session that someone has

[13] Similarly, the Service's regulations provide that the Secretary of Labor must certify whether non-immigrants temporarily entering the United States for purposes of employment under Section 101(a)(15)(H) of the Act, 8 U.S.C. 1101(a)(15)(H), will compete with American labor. 8 C.F.R. 214.2(h)(2)(ii).

> the courage to say: "You have a cancer on your arm. You had better cut it out before it gets worse." We are talking about a situation which affects that drastically the living conditions of millions of people in this country.

Thus, it is clear that the executive branch seen as a whole, has not consistently upheld the commuter practice.

d. *Congress Has Never Ratified The Commuter Practice.* This Court has generally looked with disfavor upon the proposition that reenactment of a statute constitutes a legislative adoption of its administrative construction. *Commissioner* v. *Glenshaw Glass*, 348 U.S. 426, 431 (1955); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1941); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1940). The Court has said of the reenactment theory (*Helvering* v. *Hallock*, *supra*, 309 U.S. at 119-120, 121):

> To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.
>
> * * *
>
> Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

The reasons for the Court's reluctance to accept reenactment as Congressional approval of an administrative practice have been ably set forth in Hart and Sachs' authoritative treatise on *The Legal Process: Basic Problems in the Making and Application of Law* (1958). In a chapter on "The Implication of Reenactment," the authors conclude that since the legislature is not under a duty to act in every case where a question affecting the public policy has been acted upon by an administrative agency, it is not rational to attach any significance to its

failure to act in a given case. *Id.* at 1395. They state that the reenactment theory is especially inappropriate in the situation of a revision and codification of an entire branch of statutory law. Such an enterprise is a necessarily technical chore having little political appeal. In order to be successful, it must be a bipartisan effort free from controversy. Acceptance of the reenactment theory would force the legislature to either of two equally untenable alternatives—either to do nothing, leaving the area of law in confusion, or to act decisively on each area of controversy which has arisen under the various statutes. *Id.* at 1402-1404.

Hart and Sachs use the Nationality Act of 1940 as their example of the unreasonableness of the reenactment theory in the codification of an area of law. *Id.* at 1402-1403. Thus, they use the very area of law involved in this case. The 1940 Nationality Act, of course, was in turn recodified in the much more comprehensive and, correspondingly, more intricate Immigration and Nationality Act of 1952.

It is therefore appropriate to scrutinize the Service's reenactment theory with great care as to whether Congress has in fact intended to approve the Service's administrative practice. We submit that such scrutiny will show that the Service's contention based on tacit approval is erroneous for at least four reasons.

First, as we have seen (p. 41), tacit Congressional approval of administrative or judicial interpretation based on reenactment of a statute cannot change the meaning of a clear federal statute. In other words, when the administrative construction is erroneous, as in the present case, reenactment of the statute can not give it validity.

Second, reenactment of a federal statute can only constitute Congressional approval of a practice which has been clear, consistent, and long confirmed. *Iselin* v.

United States, 270 U.S. 245, 251 (1945); *United States* v. *Missouri Pacific R. Co.*, *supra*, 278 U.S. at 280; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16, 20-21 (1932); *Helvering* v. *Hallock*, *supra*, 309 U.S. at 120. As we have seen (pp. 47-53), the Service's administration of this statute has not been clear, consistent or long-standing.

Third, the Service's administrative practice did not exist when the statutes in question were enacted. The seasonal commuter practice began in 1964 (or at least in the 1960's) and Congress believed that seasonal agricultural workers would be covered under Section 101(a)(15)(H)(ii) of existing law. See pp. 49-52 above and 79-81 below. Since no major immigration statute has been enacted subsequent to 1965 when the Service ignored both the statute and Congress' purpose, Congress could not possibly have acquiesced in the Service's illegal actions.

While the daily commuter procedure began in the 1920s, it had no important substantive effect until after adoption of the 1952 Act. As we have seen (pp. 24-25, 33-34), Congress, in the 1965 amendments, the only important immigration legislation adopted since 1952, far from approving the commuter practice, indicated its disapproval and its intention to end it.

Fourth, as the court below found (Gov. Pet. App. A, p. 26), there is no indication in the history of any immigration law that Congress intended to approve the commuter practice. The Service is therefore forced to rely on the alleged existence of its practice, Congressional knowledge of it, and the fact that Congress passed general immigration legislation. Congressional action in passing immigration legislation, without any suggestion of approval of the commuter practice, is hardly entitled to significant weight.

The Service notes (Gov. Br. 47-51) that several attempts were made prior to 1952 in Congress, including

in the Alien Registration Act of 1940, 54 Stat. 670, to end the commuter system. As we have seen, however, until 1952, the commuter system was essentially an administrative convenience and did not undermine protection for American labor because both Mexican and Canadians could readily obtain immigrant visas. Therefore, the determination of Congress not to end the system at that time has no relevance to whether Congress intended the system to be used after 1952 to undermine new and important restrictions on the entry of foreign workers.

The Service points (Gov. Br. 52-54) to references to the commuter program in the Senate Report accompanying the Immigration Act of 1952 as an endorsement for the program. S. Rep. No. 1515, 81st Cong., 2d Sess. 535-536, 616 (1950), describes the commuter practice as part of a lengthy report of some 925 pages prepared early in 1950 covering the immigration system of the United States as it existed prior to the enactment of the Immigration Act of 1952. The references to the commuter practice consist of brief descriptions of current immigration practices as they existed at that time. They neither approved nor disapproved the practice.

Congress not only did not register approval for the commuter practice in the legislative history accompanying the Immigration and Nationality Act of 1952 but in fact tightened the language of provisions which the Service had cited to support the practice and added new provisions to immigration law further to protect domestic labor.

For example, prior to the 1952 Act, the term "nonquota immigrant" was defined as an "immigrant who is returning from a temporary visit abroad." Immigration Act of 1924, Sec. 4(b), 43 Stat. 155. The 1952 Act tightened the definition by adding the phrase "lawfully admitted for permanent residence." Section 101(a)(27)(B), 8 U.S.C. 1101(a)(27)(B). Similarly, Section 13(b)

of the 1924 Act provided that an immigrant who had "been legally admitted to the United States and who departed therefrom temporarily" might be admitted without an immigration visa. 43 Stat. 161. Section 211(b) of the 1952 Act added "lawfully admitted for permanent residence." 66 Stat. 181. These definitions relate directly to the commuter issue since it is Section 211(b) which authorizes the admission of immigrants without immigrant visas and that Section defines the eligible immigrants as those coming within the Act's definition of non-quota immigrants.[14]

Several new provisions were added by the Immigration and Nationality Act of 1952 which are also pertinent to the commuter situation. For the first time, the concept of "residence" was defined to mean "the place of general abode" which in turn is defined as the "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33), 8 U.S.C. 1101(a)(33). As we described (pp. 20-22), commuters do not have a residence in the United States under the Act's new definition of residence.

The 1952 Act also added in Section 212(a)(14) a labor certification provision to exclude immigrants who would economically harm American workers. 66 Stat. 183. If the Secretary of Labor determined that such immigrants would work in employment having a surplus of domestic labor or would adversely affect wages or working conditions of domestic labor, they could not obtain immigrant visas to enter the country. This new provision, particularly as strengthened by the 1965 amendments (see p. 67 below), offers additional protection for domestic labor. This protection is significantly undermined by continuance of the commuter system because

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[14] After the 1965 amendments, these eligible immigrants were labeled as "speical immigrants." Section 101(a)(27)(B), 8 U.S.C. 1101(a)(27)(B).

the Service permits commuters to enter pursuant to green cards without a labor certification.

Finally, the 1952 Act added two provisions to immigration law which principally relate to plaintiffs' claim that commuters are properly non-immigrants. See pp. 73-90 below. One, Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), defined "lawfully admitted for permanent residence" to state specifically that an alien continues to come within this category only as long as his status has not changed. The other, Section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii), adds a new non-immigrant category for persons coming temporarily to work in the United States. This section allows such temporary workers to enter only "if unemployed persons capable of performing such service or labor cannot be found in this country." As we show below, all seasonal commuters and those daily commuters who work only part of the year in the United States are properly non-immigrant aliens under Section 101(a)(15)(H)(ii) and cannot enter since there is a surplus of farm labor.

The 1965 amendments to the Immigration and Nationality Act further reflect Congressional dissatisfaction with the commuter practice. As we have seen (pp. 24-25, 33-34), the Committee staff challenged the legality of the practice and expressed serious concern over its impact on domestic labor at the hearings before the House Judiciary Committee preceding passage of the 1965 Act. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, pp. 166-169 (1963). As we have further shown, Congress' rewording of Section 211(b) to allow waiver of the visa requirement only in the case of "returning resident immigrants" removed the statutory basis for the use of green cards by commuters.

Moreover, the commuter program has been repeatedly examined and denounced before and by the Congressional

committees responsible for immigration matters. In 1963 the House Committee on Immigration and Naturalization conducted hearings on "Commuter Workers" as part of a larger *Study of Population and Immigration Problems*; the Senate Sub-Committee on Immigration and Naturalization conducted hearings on the *Alien Commuter "Green Card" System* in 1967; the Select Commission on Western Hemisphere Immigration held five sets of hearings on *The Impact of Commuter Aliens Along the Mexican and Canadian Borders* in 1968; the House Special Subcommittee on Labor of the Committee on Education and Labor held hearings in 1969 on the *Employment of "Green Card" Aliens during Labor Disputes*; and the Senate Subcommittee on Migratory Labor held hearings on *Migrant and Seasonal Farmworker Powerlessness; Part 5: The Border Commuter Labor Problem* in 1969. The unanimous reaction of these Congressional committees has been incredulity at the twisted interpretation which the Immigration Service has given immigration law in order to permit the commuter practice and indignation that the Service has ignored a Congressional mandate to protect American labor.

During these studies of the commuter problem, many Congressional leaders clearly stated that the practice violated the letter and intent of the immigration law:

> "Senator Kennedy [floor manager for the 1965 Immigration Amendments]: First, the system is a creature of administrative ingenuity, without statutory base, and for more than 40 years has operated rather freely outside the Immigration laws. Problems have inevitably emerged. Adequate determinations have not been made, for example, as to whether or not aliens who reside outside the United States, but who regularly commute to places of employment within our country, are entitled to hold green cards and permanent resident status as regular bona fide immigrants. I feel there is reason to believe that such

a practice is an abuse of the intent and purpose of the Immigration and Nationality Act. Green cards are not permanent re-entry permits." [Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 2 (1967)]

"Senator Yarborough [Chairman, Senate Committee on Labor and Public Welfare]: It seems to me that when you issue the green card, the way it works is, in effect, saying: Well, the man who holds a green card, this represents an executive suspension of the immigration laws of Congress, because you say in your statement that he is a resident alien, the fact that he works in this country he qualifies as a resident alien but is not required to be a resident here.

"Secretary Wirtz. That does not make sense.

"Senator Yarborough. No. You say he is a resident alien when he is not a resident alien. He is a resident of the other nation, travels back and forth across the bridge every day and you give him a special status. This is just a suspension. This green card is something outside the law, it seems to me." [*Id.* at 33-34]

"Senator Kennedy: Now, it seems to me that the question about these fellows going back [commuters returning to the United States] by your admission and by Judge Youngdahl's description in the court [*Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 119, note 6 (D.D.C., 1960)] that this is fiction. I hope that you are not relying on that." [*Id.* at 56]

* * * *

"Senator Kennedy: * * * But even using that definition of the permanent resident [Section 101(a)(27)(B)], I do not see how you could possibly say that these individuals who do reside in Mexico could fulfill that requirement. It says, are residing permanently in the United States, they are not residing permanently in the United States.

"Mr. Gordon [General Counsel of the Immigration and Naturalization Service]: Lawfully admitted for permanent residence.

"Senator Kennedy: But they are not residing.

"Mr. Gordon: That is true, they are given the privilege of establishing residence." [*Id.* at 62-63]

"Senator Yarborough: It is an administrative practice [commuter practice] that grew up outside of the law. There is no legal basis for the issuance of the green card. There is no law provided for the issuance of the green cards. The green card system operates rather freely outside of the immigration law." [Hearings on the Impact of Commuter Aliens Along the Mexican and Canadian Borders before the Select Commission on Western Hemisphere Immigration, Part I, p. 211 (1968)]

"Senator Yarborough: I want to emphasize that what he [Mr. Guerra, a witness] says, that this is correct, that there is no statutory authority whatsoever, that they just administratively decided to do this." [Hearings on Migrant and Seasonal Farmworker Powerlessness; Part V: Border Commuter Labor Problems before Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2577 (1969)]

Congressman Feighan, the Chairman of the House Subcommittee on Immigration and Nationality, stated on the floor of the House (115 Cong. Rec. 7752-7753 (1967)):

> This system—a creature of administrative ingenuity without a statutory base—permits Canadian and Mexican workers who have been lawfully admitted to the United States for permanent residence, and who hold alien registration receipt cards, commonly known as "green cards," to reside in Canada or Mexico and regularly commute across the border to places of employment in the United States.

Senator Kennedy, the floor manager of the 1965 amendments, has stated on the floor of the Senate that the commuter system is "a creature of administrative ingenuity without a statutory base." 117 Cong. Rec. 7660 (1971). He said that the system "does not carry out" "a major thrust of the immigration laws [which] has always been to protect the working conditions and job opportunities of American workers." *Ibid.* "I don't believe aliens should be given the unique privilege of being considered *bona fide* immigrants for the purposes of employment in this country, when they choose to reside across the border and fail to become immigrants in the sense contemplated by law." *Ibid.*

In Senate hearings, Senator Mondale, Chairman of the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, and former Assistant Secretary of Labor Stanley Ruttenberg specifically discussed and rejected the Immigration Service's reenactment argument. Hearings on Migrant and Seasonal Farmworker Powerlessness, Part 5: Border Commuter Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. (1969). Ruttenberg, who had been Manpower Administrator and a member of the Select Commission on Western Hemisphere Immigration, said that "nothing in the legislation, nothing in the law condones or even established in any way the fact that a commuter may live in Mexico and work in the United States. *Id.* at 2530. Senator Mondale stated that the position of the Immigration Service concerning reenactment was "specious." *Id.* at 2544. He then went on to say (*id.* at 2544, 2594):

> [I]t is a very, very tenuous argument. It is one that you use when you want policy to come out that way, and apparently someone wanted it to come out that way.
>
> * * * *

> They have taken the position, apparently in the Justice Department, to the effect that * * * when we passed the 1965 act, we therefore incorporated it by reference.
>
> I think, as the Senator from New York knows, that *that was one of the most tenuous legal theories that one could go on, to let our legislatures ratify illegality when they adopt a ruling not dealing with the subject, but in the same generic area. That is basically the thin position of the Justice Department.* (emphasis added)

We submit that Senator Mondale was correct—that the Service's reenactment theory is without any sound basis. The history of the commuter practice and of Congress' response to it is, when considered most favorably from the standpoint of the Service, is inconclusive. It is simply impossible to know or even guess from this history what Congress would have done in 1952 or 1965 or would do today if the issues in this case were directly presented to it. We therefore submit that the legality of the commuter system must be determined on the basis of the most persuasive and controlling evidence of Congressional intent—the language of the Act.

B. Section 212(a)(14) Of The Act Requires That Commuters Obtain A Labor Certification From The Secretary Of Labor Before Entering The United States

1. *The Language of Section 212(a)(14) Applies to Commuters*

An immigrant may not be admitted to the United States unless the Secretary of Labor has certified, pursuant to Section 212(a)(14) of the Act, 8 U.S.C. 1182 (a)(14), that there are not sufficient domestic workers to perform such labor and that his employment would not adversely affect the wages of American laborers. Section 212(a)(14) is applicable to aliens "seeking to

enter the United States, for the purpose of performing skilled or unskilled labor" who come within Section 101 (a) (27) (A) of the Act, 8 U.S.C. 1101(a) (27) (A), *i.e.*, "an immigrant who was born in an independent foreign country of the Western Hemisphere."

Daily and seasonal commuters come within Section 101(a) (27) (A) because they were born in Mexico, and therefore the certification requirements of Section 212 (a) (14) are fully applicable. The Secretary of Labor has determined pursuant to Section 212(a) (14) and 29 C.F.R. 60.1, which was promulgated thereunder, that the supply of domestic farm labor is sufficient and that the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6. This decision was reissued on February 4, 1971, 36 Fed. Reg. 2463, 2466. The commuter alien employed as an agricultural worker or seeking such employment is therefore ineligible for admission to the United States.

Since the language of Section 212(a) (14) and 101(a) (27) is clear, there is no need to rely upon other aids to judicial construction. However, if the language is deemed ambiguous, we submit that both the purpose and legislative history confirm that Section 212(a) (14) applies to daily and seasonal commuters.

2. *The Purpose of Section 212(a)(14) Supports Its Applicability to Commuters*

Prior to 1952, American labor was protected by a provision excluding contract laborers and persons induced or assisted to come to the United States. However, the "contract labor clauses" were omitted from the Immigration and Nationality Act of 1952 and Section 212(a) (14) was added. 66 Stat. 183. The purpose of the new provision was to provide more adequate pro-

tection for American labor (H. Rep. No. 1365, 83d Cong., 2d Sess. 50 (1952)):

> It is the opinion of the Committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

See also S. Rep. No. 1137, 82d Cong., 2d Sess. 11 (1952).

Unfortunately, Section 212(a)(14) proved ineffective in practice. It allowed immigrants to enter the United States unless the Secretary of Labor certified that the entry of the immigrants would harm American labor. 66 Stat. 183. Stanley H. Ruttenberg, then Assistant Secretary of the Department of Labor, described the operation of Section 212(a)(14). Review of the Operation of the Immigration and Nationality Act as Amended by the Act of October 3, 1965, Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 111 (1968):

> Under the old provision, the Department of Labor was able to prevent undue competition with U.S. workers and adverse effects on their wages and working conditions only on rare occasions.

Congressional concern over the ineffectiveness of Section 212(a)(14) was reflected in the 1965 amendments to the Immigration and Nationality Act which radically changed the operation of Section 212(a)(14). Under the new section, the burden of initiating the certification process was removed from the Secretary of Labor and placed on the entering alien. He can now enter the United States only if the Secretary of Labor determines that his entry will not harm American labor. Under the new provision, the Secretary has with one determination found that domestic farm labor would be threatened

by the entry of foreign agricultural workers. Schedule B, following 20 C.F.R. 60.6.

After calling Section 212(a)(14) "the major safeguard for American labor," Gordon and Rosenfield go on to say (Sec. 2.40):

> The 1965 amendments made a radical change in the statute, in order to strengthen the controls protecting American labor.
>
> * * * *
>
> The 1965 amendments obviously represent a dramatic reversal of course for the immigration policy of the United States. Previously those seeking economic opportunities had been encouraged to come. On and after December 1, 1965, access to employment opportunities in the United States has been severely curtailed.

The Immigration Service claims that commuters are only subject to the Secretary of Labor's labor certification on their initial entry into the country. Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Labor Problems before Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 1976 (1969). Thereafter, according to the Immigration Service, they are immigrants returning from a temporary visit abroad (Section 101(27)(B)) rather than immigrants born in the Western Hemisphere (Section 101 (27)(A)).

The majority of commuters initially sought entrance to the United States between 1952 and 1965. Most entered the country during the period when Section 212(a)(14) was virtually ineffective. Thus, the practical effect of the Immigration Service's interpretation of Section 212(a)(14) is that most commuter aliens who freely cross our borders to work have never been subject to the labor certification requirement. They continue to

enter the United States to perform agricultural labor even though the Secretary of Labor has determined that there is a surplus of domestic labor and the entry of immigrants to perform such labor harms the wages and working conditions of domestic labor.

Exemption of the commuter from Section 212(a)(14) as an immigrant returning from a temporary visit abroad defeats the stated purpose of that provision to protect domestic workers from competition with foreign labor. All immigrants entering the United States to work must obtain a labor certification on their initial entry. The immigrant who establishes a permanent residence in the United States is not subject to the certification thereafter on his return from "a temporary visit abroad" because he has himself become a domestic American worker. The commuter should be subject to the certification at every entry because he never ceases to be a foreign worker. Living in a foreign economy he is not subject to the same expenses as the American worker. The lower wages which he will thus accept, the working conditions that he will endure, are the very conditions which Section 212(a)(14) was meant to prevent.

3. *The Legislative History of Section 212(a)(14) Supports Its Applicability to Commuters*

The legislative history of Section 212(a)(14) indicates that the commuter is the very prototype of foreign worker against whom the section was meant to protect. The House Judiciary Committee's analysis of Section 212(a)(14) stated (H. Rep. No. 745, 89th Cong., 1st Sess. 21 (1965)):

> [Section 212(a)(14] is restated so as to require an affirmative finding by the Secretary of Labor that *any alien* seeking to enter the United States as a worker, skilled or otherwise, will not replace a worker in the United States nor will the employment of

> such alien adversely affect the wages and working conditions of individuals in the U.S. similarly employed. (emphasis added)

Congressman Cellar, the long-time Chairman of the House Immigration and Naturalization Committee and manager of the 1965 amendments to the Immigration Act during floor debate, was adamant that every alien coming from the Western Hemisphere to work in the United States must obtain a labor certification (111 Cong. Rec. 21591 (1965)):

> [I]n each instance, in every single instance there must be issued by the Secretary of Labor a certificate to the effect that as to the person coming from the Western Hemisphere, his coming will not have the effect of depressing wages or adversely affecting the conditions of employment.

Although the Committee report accompanying the amendment did not mention the commuter by name, Senator Kennedy, its Floor Manager, and Charles Gordon, the Service's General Counsel, had a long discussion concerning the applicability of Section 212(a)(14) to commuters during Senate hearings subsequent to adoption of the amendments. First, Senator Kennedy said that the exclusion of commuters from the labor certification would blatantly circumvent the intent and scope of the 1965 amendments (Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 6 (1967)):

> What we are really interested in by the adoption of those provisions [212(a)(14)] is not that we are just trying to keep someone out of the United States but that we would not have the effect of depressing wages and working conditions of American nationals.
>
> Clearly, where we see individuals [commuters] being able to come into the United States and cir-

> cumvent the intent and scope of this legislation, it is a matter of considerable distress.

Senator Kennedy expressed amazement that Mr. Gordon was exempting the commuter from the certification requirements of Section 212(a)(14) by relying on an interpretation of returning immigrant in Section 101(a)(27)(B) which Gordon had himself termed "a fiction." *Id.* at 56.

In short, the legislative history, as well as the language and purpose of Section 212(a)(14), make clear that it applies to commuters whenever they enter the United States.

4. *The Board of Immigration and Naturalization Appeals Has Held That Section 212(a)(14) Applies to Commuters*

In *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114 (D. D.C., 1960), the district court held that commuters were subject to the Secretary of Labor's certification under Section 212(a)(14). The Secretary of Labor had certified that the admission of any alien for employment at the Peyton Packing Company of El Paso, Texas, would adversely affect domestic workers. Despite the Secretary's certification, the Immigration Service continued to allow commuters to work at the plant as immigrants "lawfully admitted for permanent residence returning from a temporary visit abroad." The court concluded that to exempt the commuter from the Secretary's certification by calling him a returning resident was to make a "shambles" of the certification requirement (*id.* at 119):

> But when the Secretary of Labor has issued a certification under § 212(a)(14) pertaining to particular employment, such an alien would be excludable. It is not sufficient to resort to an "amiable fiction" to justify a wholesale evasion of the Secretary's cer-

tification—Mexican commuters destined for the employment covered by the certification must be excluded just as any other Mexican non-resident alien. To do otherwise would be to permit administrative practice to make a shambles of a provision which with § 101(a)(15)(H), was newly designed by the 1952 Act in order to assure "strong safeguards for American labor."

The facts of *Matter of J—— P——*, 9 I. & N. 591 (1962), are symptomatic of the entire commuter problem. The alien, a Mexican national, had attempted to live in El Paso, Texas, rather than commute to the Peyton Packing Company in El Paso. The wages at the Peyton plant were so low, however, that he could not afford to live in El Paso and he moved back to Mexico. From his home in Mexico, he continued to work for Peyton daily, acting as a strikebreaker against the domestic workers at the plant and helping to lower their wages to a level on which a resident of the United States could not survive. *Id.* at 593. The Board of Immigration Appeals held that the commuter could not enter the United States to work at the Peyton plant but said that this determination was dictated by the district court decision in *Amalgamated* and did not apply generally. *Id.* at 594.

The Board has subsequently restated this holding as a principle applicable to all commuters. *Matter of Bailey*, 11 I. & N. 466 (1965). There the Board broadened the definition of commuter because it found that domestic labor was already adequately protected from the commuter by the Secretary of Labor's certification under Section 212(a)(14). *Id.* at 467, 471, note 2.

Thus, the Board of Immigration Appeals has concluded that, even though commuters can utilize green cards to enter the United States, they still can only enter when the Secretary of Labor has not certified that their em-

ployment will harm American labor. Since the Secretary of Labor has found that commuters who enter the United States to perform agricultural labor are harming American labor, commuters are not entitled to enter for this purpose. In short, both daily and seasonal commuters are barred from entry pursuant to green cards, immigrant visas or any other documents as long as there is no shortage of domestic agricultural labor and their entry is adversely affecting wages and working conditions for these domestic workers.

II

MOST COMMUTERS ARE PROPERLY NON-IMMIGRANTS WHO MAY NOT BE ADMITTED INTO THE UNITED STATES UNLESS THE SECRETARY OF LABOR DETERMINES THERE IS A LABOR SHORTAGE

We assumed in Part I above that commuters are immigrants and contended that they are required to have an immigrant visa and a labor certification from the Secretary of Labor in order to enter the United States. We submit, however, that the large majority of the Mexican nationals involved in this case are non-immigrants under Section 101(a)(15(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii), rather than, as the Section treats them, as immigrants.

If commuters are non-immigrants, they cannot enter the United States to perform agricultural labor. Subsection (H)(ii) allows non-immigrants to enter the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country." The Service's own regulations allow these non-immigrants to enter the United States only if the Secretary of Labor issues a certification that domestic labor is not available

and that employment of the alien will not adversely affect the wages and working conditions of American workers. 8 C.F.R. 214.2(h)(2)(ii). Department of Labor regulations provide that non-immigrants may only enter the United States pursuant to this subsection if the prospective employer satisfies criteria established by the Secretary of Labor, including that he has attempted to recruit farmworkers locally; has offered wages, housing, and other fringe benefits at specified levels; and has abided by state and local labor, health, and housing laws. 20 C.F.R. 602.10, 602.10a, 602.10b. Since there is no shortage of unskilled farm labor in the western United States, the Secretary of Labor has not issued certifications under Subsection (H)(ii) since 1967 to allow Mexican aliens to enter the United States to work as farm laborers and therefore Mexican nationals are not admissible for such employment. Department of Labor, Rural Manpower Development, p. 20 (Fall 1973).

A. Most Commuters Coming To The United States Are Properly Non-Immigrants

The Immigration and Nationality Act defines an immigrant as an alien not coming within the ten categories of immigrants. Section 101(a)(15), 8 U.S.C. 1101(a)(15). Section 101(a)(15)(H) defines as a non-immigrant:

> [A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *.

We submit that this provision on its face requires the Service to consider all seasonal commuters and those daily commuters who do not come to a permanent job in the United States as non-immigrants who must satisfy the criteria of Subsection (H) and the Department of Labor's regulations in order to enter the United States. As the court below held (Gov. Pet. App. A, pp. 22-23):

> Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Seasonal commuters involved in this case come clearly within that section.

The same reasoning equally applies to those daily commuters who come to the United States daily only during the agricultural season.[15]

Congress intended in the Immigration and Nationality Act of 1952 to differentiate carefully between immigrants coming ito the United States for permanent residence and non-immigrants coming temporarily (H. Rep. No. 1365, 82d Cong., 2d Sess. 36-37 (1952)):

> The immigrant class includes those aliens who seek to enter the United States for permanent residence, while the non-immigrant class includes those aliens who seek to enter for temporary periods of stay.

Congress therefore in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily "to perform services or labor," which exactly describes the situation of the commuter worker. The purpose of the provision was to allow the admission of workers to

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[15] The Service claims (Gov. Br. 21) that it "has consistently construed the subsection [(H)(ii)] as not encompassing an alien who, like the commuter, comes to the country to perform a job of a permanent character, even though the period of service is limited." The Service does not explain how seasonal agricultural work can be deemed permanent. Daily and seasonal commuters, who enter the country only during the agricultural season, enter temporarily themselves, provide only temporary services or labor, and work at temporary jobs.

alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." *Id.* at 44-45.

In deciding to add Subsection (H) to the Act, Congress was heavily influenced by the impact of alien labor on domestic agricultural labor, the very subject involved in this case S. Rep. No. 1515, 81st Cong., 2d Sess. 586, 590 (1950). Officials of the Immigration and Naturalization Service had indicated to the Judiciary Committee that there was a shortage of domestic farm labor. *Id.* at 586. On the other hand, both labor and farm organizations had testified to the adequacy of domestic labor and the adverse effects on domestic labor of importing alien agricultural laborers. *Ibid.*; Joint Hearings on S. 716, H.R. 2379 and H.R. 3816, "Bills to Revise the Laws Relating to Immigration, Naturalization and Nationality" Before the Subcommittee of the Committee on the Judiciary, 82d Cong., 1st Sess. 119-122, 664 (1951). A spokesman for the American Federation of Labor told the Subcommittee that importation of Mexican labor was particularly injurious to American workers (*id.* at 663):

> The Mexican immigration into this country has tended to increase since the turn of the century. They have accepted wages much lower than the native American and have been displacing American agricultural labor and railroad labor. Our wages in agriculture are still notoriously low, but as long as it is possible to get "cheap" foreign labor, there is little likelihood of it being raised.

Weighing the conflicting testimony, Congress added Section 101(15)(H) which allowed for temporary admission of agricultural labor but only after a determination had been made that such labor was not available in this country. S. Rep. No. 1515, *supra*, p. 586.[16]

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[16] The only explicit references to the commuter system in Senate Report No. 1515 came under headings involving non-immigrants.

We submit that the large majority of daily and seasonal commuters involved in this case come clearly within Section 101(a)(15)(H). Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. *Hess* v. *Esperdy*, 234 F. Supp. 909, 911 (S.D. N.Y., 1964); 1 Gordon and Rosenfield, 1 *Immigration Law and Procedure*, Sec. 214a (rev. ed., 1973). Commuters have residences in a foreign country which they have no intention of abandoning and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Thus, Subsection (H) applies to all seasonal commuters and to those daily commuters who commute only during the agricultural season.

Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.[17] However, most daily commuters who work as agricultural laborers, like seasonal agricultural commuters, work only during the agricultural season and therefore fall within Subsection (H). Moreover, Subsection (H) applies to all daily commuters who change employers, even if they work all of the year in

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Id. at 535-536, 616. The Service quotes (Gov. Br. 54) from this report a statement that commuters are immigrants. Since that statement is part of a description of current immigration practices prior to the 1952, that statement is fully consistent with plaintiffs' position. We contend that the 1952 Act, by adding Section 101(a)(15)(H), made commuters non-immigrants.

[17] The court below correctly concluded (Gov. Pet. App. A, p. 23, note 13):

> Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

the United States, since both their visits and the services they perform are temporary.

In its 1955 Report on the Administration of the Immigration and Nationality Act, the House Committee on the Judiciary explicitly stated that seasonal workers should be considered as non-immigrant temporary laborers under Section 101(a)(15)(H)(ii) (Report on the Administration of the Immigration and Nationality Act by the House Committee on the Judiciary, Part II, p. 131 (1955)):

> The Special subcommittee is of the opinion that the economic development of the Virgin Islands of the United States could be further enhanced by a more realistic and expeditious application of subdivision (H)(ii) of Section 101(a)(15) of the Immigration and Nationality Act, which would permit the temporary employment of natives of the British island of Tortola at jobs which become available at specified seasons, either in agriculture or in the tourist (hotel) industry. *The language of this section has been construed by the immigration officials in such manner that these hotel and agricultural workers are considered permanent workers. It is the sense of the Subcommittee that this interpretation is too restrictive, and that Congress intended that workers employed in seasonally available jobs should be considered as temporary workers.* (emphasis in original)

The Immigration Service has itself quoted the Judiciary Committee's Report to substantiate the fact that seasonal workers are temporary laborers coming within Section 101(a)(15)(H). "Employment of Western Hemisphere Natives as Temporary Workers," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 96 (1968). Moreover, the Immigration Service told the Commission, in direct contradiction of the facts, that:

> Since the termination of the "bracero" program on December 31, 1964, the importation of Mexican temporary agricultural laborers has been accomplished in accordance with the provisions of section 101(a)(15)(H)(ii) and 214(c) of the Immigration and Nationality Act, and implementing regulations in 8 C.F.R. 214.2(h).

And Gordon and Rosenfield state (1 *Immigration Law and Procedure*, Sec. 6.9 (rev. ed. 1973)):

> Since the expiration of the special legislation dealing with the braceros, the normal immigration procedure for the importation of temporary workers does offer the only legal avenue for obtaining temporary agricultural workers from Mexico.

Despite the specific direction of the Judiciary Committee to treat seasonal workers as non-immigrants and the Service's claim that it was doing so, the Immigration Service broadened the daily commuter concept to include seasonal workers after the end of the bracero program in 1964. As the court of appeals found, "the Service after the termination of the bracero program in 1964 created a new class of commuters—a 'new immigrant', the seasonal worker" and this "metamorphasis of the bracero to seasonal commuter is directly inconsistent with Congress' purpose in ending the bracero program in order to eliminate its adverse impact on American workers." Gov. App. A, p. 20.

Congress agreed in 1963 to terminate the bracero program at the end of 1964. 109 Cong. Rec. 15203, 23155, 23222 (1963). The reason that the program was not extended was, as Senator Proxmire stated, because of the adverse impact of the bracero program on domestic American labor (*id.* at 15187):

> [T]hose who believe in free enterprise in America, who believe in the law of supply and demand, should not support a governmental policy subsidized

> by the American taxpayers that imports foreign workers at a time when there is considerable unemployment, and when the effect of the importation is to keep the wages of domestic workers from rising.

Secretary of Labor Willard Wirtz described the termination of the bracero program (Report of the Secretary of Labor, "Year of Transition—Seasonal Farm Labor—1965," pp. 2, H-2 (1965)):

> The drastic reduction in the use of foreign farm labor in 1965 reflected the recognition that continuation of the previous practice would have been totally inconsistent with the contemporary national decision to perfect the American social and economic order.
>
> * * * *
>
> There has been increasing complaint against the importation of these hundreds of thousands of foreign workers—being paid wage rates as low as 60 cents an hour—while about four million U.S. men and women are unemployed.
>
> There has also been accumulating evidence that U.S. workers will be available to do this work if decent working conditions are provided and if it is paid for on terms in line with those for other work that is equally hard and unpleasant.
>
> The 88th Congress, taking these facts into account decided to terminate Public Law 78.

Congress felt that American agricultural workers would be better protected if the bracero program was eliminated and future bona fide labor needs were supplied by non-immigrants entering under Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (109 Cong. Rec. 15187):

> I [Senator Proxmire] would like to eliminate Public Law 78 [the bracero program]. Then it would be possible, under present policies which have been followed by the Department of Labor since June of

> this year, to limit the number coming in under Public Law 414 [Section 101(a)(15)(H)] to provide for the legitimate need for additional Mexican workers.

Secretary Wirtz promised that, "There will be no administrative extension of the situation existing under Public Law No. 78." Report of the Secretary of Labor, *supra*, p. H-3. Mr. Wirtz stated that "proposals to extend Public Law 78 by administrative action of one kind or another fly squarely in the face of the decision made by Congress. These proposals must be, and they are, rejected." *Id.* at H-2.

Despite Secretary Wirtz's position, the Immigration Service blatantly ignored the Congressional mandate to consider seasonal workers as non-immigrants. James S. Hennessy, Assistant to the Commissioner of the Service, admitted that the seasonal workers are in fact exbraceros (Hearings on Employment of "Green Card" Aliens During Labor Disputes before the Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 73 (1969)):

> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

See also pp. 49-51 above.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress' purpose in ending the bracero program to eliminate its adverse impact on American workers. While inadequate, the bracero program had many protections designed to protect domestic labor. See p. 50 above. In contrast, the exbracero as a commuter immigrant enters and leaves the United States freely, subject to none of the many safe-

guards for domestic labor which characterized the bracero program prior to its termination in 1964. Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 126 (1967); Hearings on Migrant and Seasonal Farmworkers Powerlessness; Part 5: Border Commuter Labor Problems before the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2586 (1969).

The Service contends (Gov. Br. 19-21) that commuters cannot be non-immigrants because "unemployed persons capable of performing such services or labor cannot be found in this country" as Subsection (H) requires if the non-immigrants are to enter the United States. We submit, however, that aliens satisfy the definition of non-immigrants under Subsection (H) if they are "coming temporarily to the United States to perform temporary services or labor." Therefore, any commuters, like any other aliens, who have a residence in a foreign country which they have no intention of abandoning and who come temporarily to the United States to perform temporary labor are non-immigrants. However, if such non-immigrants desire to perform labor which unemployed persons in the United States can perform, Subsection (H) does not allow them to enter the country. There is nothing strange in an interpretation of the statute which classifies commuters and other aliens in a way which does not allow them to come to the United States. As we have seen, the reason for Subsection (H), like many other provisions of the immigration laws, was to protect American labor from competition from foreign workers.

The Service's position is inconsistent with the basic structure of the immigration laws. As Subsection (H) indicates, non-immigrants are essentially persons who come to the United States for a temporary period. Im-

migrants are basically persons who seek to enter the United States to obtain permanent residence. The Service's position, however, would make the determination whether aliens are immigrants or non-immigrants depend not on whether they are coming temporarily but rather on whether there are unemployed persons in the United States who can perform the services or labor involved. Thus, aliens would be classified differently based on differences in occupations or even differences in the time when they desire to enter depending on the determination of the Department of Labor concerning employment conditions. It is clearly much more consistent with the Act to consider the phrase in Subsection (H)(ii) relating to the temporary nature of the visit as defining the class of non-immigrants and the phrase relating to unemployed persons as determining which of the non-immigrants would be allowed to enter the United States. This is parallel to the Act's provisions relating to the entry of immigrants which in Section 214(a) restricts their entry on an almost identical basis as Subsection (H)(ii).

In any event, even if the Service is correct and commuters are not non-immigrants under Subsection (H) because there are unemployed persons capable of performing these services or labor, the legislative history described above still demonstrates that most commuters cannot enter the United States as immigrants. Congress clearly intended Subsection (H) to govern the entry of all commuters who were coming to temporary employment in the United States which includes all seasonal commuters and those daily commuters who come only during the agricultural season. Therefore, if these commuters cannot qualify for entry as non-immigrants under Subsection (H), Congress neither expected nor intended that they could freely enter this country, despite the existence of ample domestic farm labor, as immigrants under Section 211(b).

The Service contends (Gov. Br. 22-23) that, even if commuters come within Subsection (H), an alien must voluntarily seek non-immigrant status and it cannot be forced on him. Plaintiffs do not, however, seek to force any alien to seek to enter the United States under any particular provision of the Act. We simply contend that the Service is required to apply provisions of Subsection (H) if a commuter desires to enter the United States. Both the language and history of Subsection (H) show that this is what Congress intended.

Plaintiff's position is fully consistent with the history of the immigration laws. When Congress in 1924 designated temporary visitors "for business or pleasure" as non-immigrants (Immigration Act of May 26, 1924, Sec. 3, 43 Stat. 153), the Immigration Service considered daily commuters to come within this provision because of their temporary contact with the United States. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 178 (1963).

In 1927, the Service reversed its position and found that commuters were not "temporarily visitors for business." General Order 86, April 1, 1927, p. 1. The Service's position was upheld by this Court in *Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231 (1930). The Court concluded that the word "business" should be interpreted to mean "intercourse of a commercial character" and not "labor for hire." *Id.* at 244. Since any alien coming to the United States is deemed an immigrant "unless he can bring himself within one of the exceptions" for non-immigrants (*id.* at 243), the Court concluded that daily commuters were automatically to be considered as immigrants. Thus, the Court did not question or even consider the temporary nature of the commuter's contact with the United States.

In the Immigration and Nationality Act of 1952, Congress reenacted in Section 101(a)(15)(B) the "business or pleasure" provision of the 1924 Act. In addition, Congress enacted Section 101(a)(15)(H) as a new category of non-immigrant. As Gordon and Rosenfield point out (1 *Immigration Law and Procedure*, Sec. 2.14a (rev. ed. 1973)), Subsection (H) was intended to allow aliens coming temporarily to the United States for employment to enter as non-immigrants, just as this class had been able to do before the Service's 1927 regulations which were upheld in *Karnuth ex rel. Albro*. Consequently, Subsection (H), as its language clearly shows, restored the situation existing prior to 1927 when commuters were considered as non-immigrants.

Moreover, the decision in *Karnuth ex rel. Albro* was explicitly based on the purpose of the Immigration Act "to protect American labor against the influx of foreign labor." 279 U.S. at 243. At that time, there were no limitations on the entrance of non-immigrants while a quota had recently been imposed for immigrants. Consequently, when the Court held that commuters were immigrants, it was protecting American labor. Today, however, since Subsection (H) was enacted for the purpose of protecting American labor and specifically restricts non-immigrants from entering the United States for employment unless no other labor is available, it is consistent with both this Court's rationale for its 1930 decision and the purpose of the immigration laws to find that Subsection (H) covers commuters.

B. Commuters, Who Originally Entered As Immigrants But Are Properly Non-Immigrants, Should Be Reclassified As Non-Immigrants

It is clear that all seasonal and most daily commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)

(15)(H). It is also plain that commuters who have previously come to the United States as immigrants admitted for permanent residence must be considered as non-immigrants.

First, commuters who have come since adoption of Subsection (H) in the 1952 Act should have been considered as non-immigrants when they first entered. As the court below held (Gov. Pet. App. A, p. 23, note 14), the Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status.

Second, whether or not commuters came to the United States for the first time prior to adoption of Subsection (I') in 1952, they now must be considered as non-immigrants. The court of appeals correctly concluded (Gov. Pet. App. A, p. 23, note 14). "The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958)." See also Besterman, "Commentary on the Immigration and Nationality Act" in 8 U.S.C. 1 to 1280, p. 46 (1954); 1 Gordon and Rosenfield, *supra*, Sec. 2.19. This doctrine has been specifically applied by the Board of Immigration and Naturalization Appeals to commuters. *Matter of Estrada-Tena*, 12 I. & N. 422 (1967); *Matter of Moore*, 13 I. & N. 711 (1971).

Consequently, when a commuter enters the United States today, the legality of this entry must be determined as of that time. Even if the commuter entered legally one or many times before as an immigrant, his entry must be reevaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

The fact that commuters originally were admitted for permanent residence does not mean that they automatically continue to have that status. Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20), makes clear that an immigrant coming to the United States for permanent residence does not acquire permanent and irrevocable status:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.* (emphasis added)

Secretary of Labor Wirtz testified before the Senate Subcommittee on Immigration and Naturalization that it was the intent of Congress that if an alien did not establish his permanent residence in the United States, his immigrant status should be discontinued. Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 24 (1967). Since most commuters never became permanent residents, they never actually had this status. And since all commuters have no permanent residence in the United States, they do not have this status today.

Officials of the Immigration and Naturalization Service have told Congressional committees that, if a commuter is admitted to the country as an immigrant for permanent residence, this privilege is permanent. In 1963, L. Paul Winings, then General Counsel of the Service, explained to a subcommittee of the House Committee on the Judiciary that the alien has "paid [his] way into the ballpark." Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, pp. 167-168 (1963). Six

years later, Charles Gordon, the Service's General Counsel, made a similar statement to a perplexed Senate Subcommittee on Immigration and Naturalization that commuters continue to have "the privilege of establishing residence." Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 63 (1967). Members of the committees rejected these interpretations at both hearings. *Id.* at 62-63; Study of Population and Immigration Problems, *supra*, pp. 168-169.

Contrary to the position of the Service, the Board of Immigration and Naturalization Appeals has specifically held that the language of Section 101(a)(20) relating to change of status includes changes of status from immigrant to non-immigrant. *In the Matter of M—— P——*, 9 I. & N. 747, 749 (1962); *In the Matter of S——*, 6 I. & N. 392 (1954). The latter decision was approved by the Attorney General in 1955. *Ibid.* See also *Matter of Marcos*, 11 I. & N. 740 (1966); *In the Matter of T——*, 6 I. & N. 778 (1955); *In the Matter of M——*, 5 I. & N. 642, 647 (1954). Consequently, it is clear that immigrants do not maintain the status of a permanent resident alien under Section 101(a)(20) if they in fact do not have a residence in this country.

If residence in this country has nothing to do with immigrant status, as Immigration Service officials have suggested, then logically the commuter is no different from any other immigrant alien. However, the Immigration Service itself does not treat commuters like other immigrants who are actually permanent residents of this country.

First, if a commuter is not employed in this country for a period of six consecutive months, the Service pur-

portedly removes his immigrant status.[18] *E.g., In the Matter of L——*, 4 I. & N. 454, 456 (1951); *Matter of M—— D—— S——*, 8 I. & N. 209 (1958); *Matter of Smith*, 11 I. & N. 738 (1966); *Matter of Wighton*, 13 I. & N. 683 (1970); Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973); Stipulation, Gov. Pet. App. D, p. 35. This rule is not applicable to non-commuter immigrants with actual residences in the United States.

Second, the Service's regulations provide that aliens may not cross the border using a Form I-151 to accept employment at a place where the Secretary of Labor has determined that a labor dispute exist. 8 C.F.R. 211.1(b)(1). The Service has interpreted this regulation to bar any daily commuters or many seasonal commuters from working for such an employer. Stipulation, Gov. Pet. App. D, pp. 35-37. Again, this rule does not apply to immigrants who are bona fide permanent residents of the United States. 1 Gordon and Rosenfield, *supra*, Sec. 2.30 (1973 Supp.).[19]

Third, commuters, unlike immigrants with actual residences in this country, are not eligible for naturalization. 8 U.S.C. 1427 requires for naturalization that an alien have residence:

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[18] The Service, however, has great difficulty enforcing this rule because of its lack of information concerning which aliens crossing the border are commuters and when they last worked in the United States.

[19] This provision was held invalid in *Sam Andrews' Sons* v. *Mitchell*, 457 F.2d 745 (C.A. 9, 1972). However, the Service is enforcing the provision other than in the Ninth Circuit. See Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973). The validity of this provision is not now before this Court since it was not decided below.

> continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time * * * [and have] resided continuously within the United States from the date of the petition up to the time of admission to citizenship * * *.

Commuters cannot be naturalized since they are not residents of the United States. *Petition of Wright*, 42 F. Supp. 306 (E.D. Mich., 1941); *Petition of Correa*, 79 F. Supp. 265 (W.D. Tex., 1948); Statement of L. Paul Winings, then General Counsel of the Immigration and Naturalization Service, in Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11, p. 180 (1963); Statement of Assistant Secretary of Labor Stanley H. Ruttenberg, Hearings on the Impact of Commuter Aliens Along the Mexican and Canadian Borders before the Select Committee on Western Hemisphere Immigration, Part I, pp. 14-15 (1968). "An alien commuter may not proceed toward naturalization until he has taken up actual permanent residence in the United States for the required statutory period." Immigration and Naturalization Service, Operations Instructions, Section 211.3 (March 28, 1973).

In short, the Mexican nationals involved in this case are commuters and not permanent resident aliens. As such, they come to the United States temporarily to provide temporary services and labor. They are therefore properly non-immigrants governed by the provisions of Section 101(a)(15)(H) and may not enter the country as immigrants using green cards.

III

THE ISSUES IN THIS CASE SHOULD BE RESOLVED BY THIS COURT

The Service contends (Gov. Br. 63) that "[t]he nature of the problem [in this case] makes it peculiarly suited for legislative, rather than judicial, resolution." In doing so, it emphasizes the effects that the end of the commuter system will have on Mexico and Canada, on our relations with these countries, on employers, and on the commuters themselves.

We agree that the end of the commuter system will have important effects.[20] In Appendix A, pp. 94-97 below, we note that the present commuter system undermines wages, working conditions, the availability of employment, and the opportunity to organize in unions for domestic farm labor. In a proper forum, we would be prepared to show that the commuter system, as a practice of sound public policy, should be abolished. However, we have not attempted in this brief to prepare a comprehensive rebuttal to the Service's position because we believe that these arguments relating to government policy, rather than the meaning of the statute, are not properly before this Court.

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[20] The Service, however, has exaggerated these effects. It is untrue that the commuters could burden American border communities by simply deciding to become residents of the United States. In fact, commuters who engage in agricultural labor could not enter the United States because, as we have seen (pp. 19, 74), the Department of Labor does not certify either immigrants or non-immigrants to enter this country for that purpose because there is no shortage of domestic farm labor. Similarly, agricultural and other employees should be able to obtain labor within the country to replace the commuters since the Secretary of Labor's determinations are based on the fact that there is an adequate supply of domestic farm labor.

We submit that the issues in this case are no more legislative than those in numerous other cases which constantly come before and are decided by this Court. Whenever this Court considers complex and important questions of statutory construction, it can fairly be said that the issues are legislative. This is true in the sense that Congress can properly weigh the competing interests involved and determine, as a matter of public policy, the appropriate result. It is also true in the sense that these are matters which are within the power of Congress to resolve, unlike questions relating to construction of the Constitution. If the courts determine the meaning of the statute in a manner inconsistent with the will of Congress, then Congress can amend it.

Similarly, here, there can be no doubt that Congress could pass a provision of the immigration law specifically determining the right of commuters to enter the United States. Instead, Congress has passed provisions which deal generally with the entry of all aliens without specific reference to commuters. The issues in this case involve the effect of these provisions on the particular situation of commuters.

Here, this Court, like the courts below, is called upon to exercise its customary responsibility to interpret a federal statute. Plaintiffs submit that the language of the Act makes commuters non-immigrants or, if they are immigrants, requires that they possess immigrant visas. The Service interprets the language of the Act differently. We submit that the entire judicial history of this country clearly demonstrates that this kind of issue involving the meaning of statutory language is properly resolved by the courts. This history likewise shows that the duty of the courts is to determine the intent of Congress, particularly from the language of the statute itself, rather to weigh the policy issues involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below in No. 73-300 should be affirmed and the judgment below in No. 73-480 should be reversed.

Respectfully submitted,

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APPENDIX A

Effects of the Commuter Practice

Extremely large numbers of Mexican nationals enter the United States as daily commuters. A count made by the Immigration and Naturalization Service on January 31, 1970, indicated that 50,202 daily commuters crossed the Mexican border to work in industrial and agricultural employment on that day alone. Immigration and Naturalization, Responses to the Senate Subcommittee on Migratory Labor, p. 3-1, in Hearings on Migrant and Seasonal Farmworkers Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 2033 (1969). It is likely that between a third and a half of these commuters worked in agricultural employment even though this was not during the agricultural season.[1] If a similar survey were conducted during the harvest season, the number of commuters and the percentage employed as agricultural workers would be greatly increased. Commuters constitute at least 85 percent of the seasonal agricultural work force in Imperial and San Diego counties in California. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 126 (1968).

Studies made by the Department of Labor show that daily commuters have a serious impact on domestic labor.

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[1] An earlier survey made by the Immigration and Naturalization Service on January 17, 1966, found that 44,000 alien commuters crossed the border that day. Ninety-five percent came to eight border areas—El Paso, Laredo, Brownsville, and Eagle Pass, Texas; Nogales and San Luis, Arizona; Calexico and San Isidro, California. Over 17,000 of these commuters worked in agricultural employment. 116 Cong. Rec. 5957 (1970).

The commuter alien lives in Mexico where living standards and costs are much lower than in this country. Thus, he is able to accept, and does accept, less pay than American residents. The result is that wages are invariably lower and unemployment greater in border areas where commuters work than elsewhere. In both California and Texas, agricultural wages are lowest in border areas and highest in areas farthest removed from the border. *Id.* at 116, 127. Unemployment in Texas border towns is 95 percent higher than in areas in the interior and in California unemployment in the Imperial Valley is twice the state's average. *Id.* at 128. "The fact that unemployment is heavy and wage rates are low in the border towns is not coincidental. Workers residing in Mexico contribute to the labor surplus by filling jobs that United States residents would otherwise have and frequently take them at wage rates unacceptable to United States residents." *Id.* at 123; see North, "The Border Crossers: People Who Live in Mexico and Work in the United States," prepared for the Manpower Administration, Department of Labor; p. 143 (April 1970). The Labor Department has found that the commuter alien further reduces the real income of United States residents by sharing in the enjoyment but not the costs of many public services in the United States such as public highways, police protection services, shopping facilities, schools, health, welfare, manpower and poverty programs. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 113; North, "Border Crossers," *supra*, pp. 185-186, 192, 196.

Most of the data concerning the commuter practice concerns daily commuters and the border areas where they work. This results from the difficulty in identifying the seasonal commuter under the Immigration Service's

methods of administering the commuter program on the Mexican border. As a result, there are widely inconsistent figures even on the number of seasonal commuters who enter the United States. On the one hand, it has been estimated that from 100,000 to 400,000 work in the fields in the United States each year. 116 Cong. Rec. 5954 (1970). On the other hand, defendants stated in the district court that they have counted just over 6,000 seasonal commuters (Memorandum of Points and Authorities, p. 2) and now state that there are 8,300 seasonal commuters (Gov. Br. 64). Charles Gordon, the General Counsel of the Immigration and Naturalization Service, refers to "a large influx of seasonal workers." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 183 (1969).

There is no doubt, however, that the seasonal commuter contributes to low wages and working conditions. Like the daily commuter, he can work for lower wages because he spends much of the year living as part of the low-cost economy of Mexico. Fineberg, "Green Card Labor and the Delano Grape Strike: A Study of Post-Bracero Mexican National Farm Workers in the San Joaquin Valley" in Hearings on Employment of "Green Card" Aliens During Labor Disputes, *supra*, p. 13.

The admission of both daily and seasonal commuters also discourages unionization. Hearings on Migrant and Seasonal Farmworker Powerlessness; Part 5: Border Commuter Farm Labor Problem before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 1951, 2531, 2543 (1969). The Farm Workers Organizing Committee has sought to organize farm labor into a strong union capable of representing the now largely unrepresented

interests of farm workers. Its efforts have been jeopardized by the large numbers of commuter aliens who are ready to take the place of union members on strike. Commuters themselves are difficult to organize because they can survive in the lower-cost Mexican economy on wages which are unacceptable to American workers. Fineberg, *supra*, p. 13.

The Labor Department, which conducted a study of the Delano, California, labor dispute concerning grape workers, concluded that seasonal commuters are being employed there as strike breakers. 116 Cong. Rec. 5964 (1970). The Immigration Service itself has admitted that the seasonal commuter is even more of a threat to domestic agricultural labor than the traditional daily commuter. James Hennessy, Executive Assistant to the Commissioner of the Immigration and Naturalization Service, testified at a Senate hearing that it is the seasonal commuter who is the chief impediment to unionization of agricultural labor in California (Unpublished Transcript of Hearings on Alien Commuter "Green Card" System before Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 52 (1967):

> [T]hose [seasonal workers] who come in late March or April and have gone along with the harvesting of the crop across the Southwest and up North. It probably is there that you are going to find the commuters who are causing the unions so much trouble in California today.

APPENDIX B

History of the Commuter Practice

Prior to 1921, Mexican nationals freely entered the United States to work. Although the Immigration and Nationality Act of 1917 prohibited the admission of alien contract labor to the United States, an exception was made for Mexican laborers. Act of February 5, 1917, Sec. 3, 39 Stat. 875. Their entry was further facilitated by Section 23 of the Act which directed the Commissioner of Immigration not to delay ordinary travel across our borders. 39 Stat. 892. Ease of entry at our Southern border, however, was dramatically ended by the temporary Immigration Act of 1921.

The 1921 Act placed numerical limitations on immigration to the United States for the first time. The numerical limitations, however, did not apply to persons born in the Western Hemisphere and to aliens who had been in Western Hemisphere countries such as Canada or Mexico for at least one year prior to immigration to the United States (Act of May 19, 1921, 42 Stat. 5, Sec. 2(a)(7)), a period later raised to five years in 1922 (Act of May 11, 1922, 42 Stat. 540, Sec. 2). The temporary legislation of 1921 was replaced by the Immigration Act of 1924 which set up a permanent system of quota allocation and control. Act of May 26, 1924, 43 Stat. 153. While the 1924 Act, like the 1921 Act, did not impose quota limitations on residents of Western Hemisphere countries, Mexican nationals were required to acquire and present entry documentation in order to cross into the United States and the border patrol was established primarily to prevent illegal entry of Mexican nationals. Study of Population and Immigration Problems, House Committee on the Judiciary, Subcommittee No. 1, Special series No. 11, p. 27 (1963).

The Immigration Act of 1924 created two categories of entering aliens, immigrants and non-immigrants. Immigrants were defined as all entering aliens with the exception of certain specified entrants who were designated as non-immigrants. Among the designated non-immigrant classes were temporary visitors "for business or pleasure." Sec. 3, 43 Stat. 153. Immigration officials considered the daily commuter as a non-immigrant "temporary visitor for business" because of the temporary nature of his contact with the United States. Study of Population and Immigration Problems, *supra*, p. 178. See also Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges, and Issues," in *Report of the Select Commission on Western Hemisphere Immigration*, p. 101 (1968).

Another innovation in the 1924 Act was to require all immigrant aliens, whether quota or nonquota, to obtain visas to enter the country. Sec. 13(a), 43 Stat. 161-162. If an immigrant alien wished to depart from the United States temporarily, he could apply for and obtain a reentry permit which he surrendered at the border upon his return. Sec. 10, 43 Stat. 158-159.

The 1924 Act did not require documents from nonimmigrants. Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States before the Senate Committee on Immigration, 70th Cong., 2d Sess. 42 (1929). Since the commuter alien was considered as a non-immigrant visitor for business, he was not required to possess entry documentation. The Immigration Service, however, under an old rule promulgated in 1917 which was republished without change in 1925 and 1927, issued a border crossing identification card to all United States citizens and aliens who frequently crossed the border in order to facilitate their entry.[1]

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[1] The Immigration Rules of March 1, 1927, provided (Rule 3, Subdivision Q, Para. 1):

[Footnote continued on page 100]

In April 1927, the Immigration and Naturalization Service reversed its position concerning daily commuters and declared that they were not "temporary visitors for business" but were immigrant aliens. General Order 86, April 1, 1927, p. 1. The primarily reason for the change was to prevent quota aliens from entering the United States through Canada and Mexico. Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States, *supra*, pp. 41-43. Many aliens from quota countries would come to Mexico or Canada and commute to work in the United States as non-immigrant visitors for business with a border crossing identification card. Under the new regulation, an alien laborer born in a quota country could not obtain the initial visa to enter the United States, while a Mexican or Canadian national could obtain an immigrant visa since no quota applied to those countries.

Once the Mexican or Canadian national who commuted to the United States was admitted, he was treated, as before, like a non-immigrant. Despite his new immigrant status, the Service did not require the daily commuter to take up residence in the United States. General Order 86, *supra*, p. 1-2. If he complied with the immigration laws, obtained a visa, and paid a head tax, he was "considered as having entered for permanent residence." *Ibid.*

The Immigration Service did not require daily commuters to have immigrant visas or reentry permits even

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[1] [Continued]

With a view to avoiding delays and embarrassment in cases of aliens and citizens, who residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress.

Cf. Immigration Rules of July 1, 1925, Rule 3, Subdivision R; Immigration Rules of May 1, 1917, Rule 12, Subdivision 9, and Rule 13, Subdivision 3.

though the 1924 Act required those documents of all immigrants. It would have been a practical impossibility for the commuter immigrant to obtain the required documentation for his daily trip across the border. Despite the clear provision of the 1924 Act, the Immigration Service decided that Congress simply could not have intended to end the commuter practice. Study of Population and Immigration Problems, *supra*, p. 178. See also *Report of the Select Commission on Western Hemisphere Immigration*, p. 101 (1968). The immigration authorities therefore continued to allow the daily commuter to enter the United States as an immigrant with the same border crossing card he had used as a non-immigrant visitor for business without regard to the 1924 Act. General Order 86, *supra*, p. 2. The Immigration Service simply republished the 1917 border crossing card regulation, this time authorizing its use for the commuter immigrant. Immigration Rules of January 1, 1930, Rule 3, Subdivision Q, Para. 1. Thus, by treating the commuter alien as an immigrant for his initial entry into the United States and a non-immigrant for his subsequent reentries, Immigration officials both managed to keep quota aliens out of the country and allowed daily commuters to enter freely.

Shortly after the Immigration Service's revision of the commuter status, two alien laborers from quota countries brought suit to obtain admission from Canada as non-immigrant temporary visitors for business. In upholding the Service's determination that daily commuters were immigrants, the Supreme Court decided that "business" must be interpreted strictly as "intercourse of a commercial character" because of a Congressional policy of restricting immigration in order to protect American labor (*Karnuth ex rel. Albro* v. *United States*, 279 U.S. 231, 243, 244 (1929)):

> The various acts of Congress since 1916 evidence a progressive policy of restricting immigration. The

history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor.

* * * *

In view of the definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with workmen, whose protection it was one of the main purposes of the legislation to secure.

Both of the plaintiffs were quota aliens. As non-immigrant visitors for business, they could freely enter and leave the United States at will. Once they were reclassified as immigrants, however, they were required to apply for an immigrant visa and come within the quota set for their country. One of the plaintiffs was born in Italy. Under the then annual immigration quota of 100 for that country, he could not have gained entry as an immigrant without an extremely long wait. Thus, the Court's decision that temporary laborers were immigrants was consistent with the Congressional policy to protect American labor.

In 1952, the immigration, nationality and naturalization laws were revised and codified in the Immigration and Nationality Act of 1952. Immigration Act of June 27, 1952, 66 Stat. 163. One of the purposes of the new Act was to provide stronger protection for domestic American labor against competition with foreign labor. S. Rep. No. 1137, 82d Cong., 2d Sess. 11 (1952); H. Rep. No. 1365, 82d Cong., 2d Sess. 51-52 (1952).

The Immigration Act of 1952 added a new non-immigrant category which, on its face, appears to include both daily and seasonal commuters (Sec. 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H)):

An alien having a residence in a foreign country which he has no intention of abandoning * * * (ii)

> who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

Another important innovation in the 1952 Immigration Act was the labor certification process of Section 212(a)(14). 66 Stat. 183. That section provided that an immigrant could not enter the United States if the Secretary of Labor certified that there were sufficient domestic workers available for the work or his entry would have an adverse impact on the wages or working conditions of domestic workers.

The Immigration Act of 1952 also tightened the language of several pre-existing provisions of immigration law having at least some relation to the commuter practice. The definition of residence (Section 101(a)(33), 8 U.S.C. 1101(a)(33); the definition of nonquota immigrant (Section 101(a)(27), 8 U.S.C. 1101(a)(27)); the authorization of the border crossing identification card (Section 101(a)(6), 8 U.S.C. 1101(a)(6)); and the provision for waiver of the immigrant visa (Section 211(b), 8 U.S.C. 1181(b)), all were modified.

After the Immigration and Nationality Act of 1952, the Immigration Service eliminated its regulations adopted in 1930 which considered daily commuters as immigrants (Immigration Rules of January 1, 1930, Rule 3, Subdivision C, para. 1) and removed all mention of commuters from the regulations. Cf. 17 Fed. Reg. 11483 (Dec. 19, 1952), with 8 C.F.R. 110.6 (1947 Supp.). Nevertheless, despite the changes in the statutes and regulations, the Service continued to treat the daily commuter as an immigrant and permanent resident alien. The labor certification requirement of Section 212(a)(14) was applied to the commuter only upon his initial entry into the United States. *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114, 116 (D. D.C., 1960).

The Alien Registration Receipt Card (Form I-151), commonly known as a "green card," replaced the border crossing identification card as an entry document after the Immigration and Nationality Act of 1952 was passed. In 1957 the Immigration Service issued a regulation which stated that the use of the green card by immigrant aliens was restricted to those having an "unrelinquished lawful permanent residence in the United States." 22 Fed. Reg. 6377; 8 C.F.R. 221.1. Nevertheless, the Immigration Service continued to allow the daily commuter to use the green card as an entry document. Staff Report of the United States Commission on Civil Rights, "The Commuter on the United States-Mexico Border," in Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 163 (1969).

In the 1960's, Congress took several further actions to protect American workers from competition with foreign labor. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico had initiated the bracero program in 1943 to provide for the seasonal importation of Mexican agricultural workers. Act of August 4, 1942, 56 Stat. 1759. In 1949, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the agreement to protect domestic labor. Act of July 12, 1951, 65 Stat. 119. Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor.

During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero program increased markedly, reaching a peak of 450,000 in 1957. Despite the added safeguards to protect American labor, there was a growing concern in the country over the adverse impact of the program on domestic labor. Congress

therefore decided in 1964 to allow the program to lapse. In the future, seasonal Mexican farm labor was to enter the United States under the provisions of the Immigration and Nationality Act providing for temporary importation of unskilled labor as non-immigrants under Section 101(a)(15)(H)(ii), when domestic labor was certified as unavailable. 8 U.S.C. 1101(a)(15)(H)(ii). See *Report of the Select Commission on Western Hemisphere Immigration*, p. 93 (1968). However, the Immigration Service broadened the commuter status to include seasonal workers so as to allow ex-braceros to continue to enter the country as immigrants. Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 70, 73 (1969). Thus, the old bracero program has continued but without the provisions which formerly protected American domestic labor.

In 1965, Congress amended the Immigration and Nationality Act of 1952 to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965). The most important change was to strengthen the labor certification process. Section 212(a)(14) of the Immigration Act of 1952 had proved ineffective because an alien could only be excluded if the Secretary of Labor had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing who had applied to immigrate to the United States to take employment, or what their occupation, residence or employer would be. Review of the Operation of the Immigration and Nationality Act as Amended by the Act of October 3, 1965, Hearings before Subcommittee No. 1 of the House Com-

mittee on the Judiciary, 90th Cong., 2d Sess. 111-112 (1968).

The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States *unless* the Secretary of Labor has certified that there are not sufficient domestic workers to perform such labor and that his employment would not adversely affect the wages of American laborers similarly employed. Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14); H. Rep. No. 745, *supra*, p. 14; S. Rep. No. 748, *supra*, p. 15.

The 1965 amendments also changed the language of Section 211(b) which describes the category of persons to whom the Attorney General could give special permission to enter the United States without visas or reentry permits. The Immigration Service had allowed commuters to enter the United States with green cards under the 1952 Act pursuant to this Section. Under the 1965 amendments, the language was changed to allow only "returning resident aliens" to enter without immigrant visas or reentry permits. Section 211(b), 8 U.S.C. 1181(b). Nevertheless, the Immigration Service continued to allow daily and seasonal commuters to enter the United States as immigrants without immigrant visas.

In 1965, influenced by the adverse impact on the American economy and American workers of unlimited immigration from countries of the Western Hemisphere, Congress for the first time placed a quota on immigration from the Western Hemisphere, including Mexico, to take effect in 1968. Act of Oct. 3, 1965, Sec. 21(e), 79 Stat. 921. The Senate Committee stated that it had "become increasingly concerned with the unregulated flow of immigration from the nonquota countries * * *." S. Rep. No. 748, 89th Cong., 1st Sess. 16 (1965). The amend-

ment was designed to stem the unrestricted flow of immigration from the Western Hemisphere and to give immigrants from the Western Hemisphere an equivalent status with aliens from other parts of the world. *Id.* at 17-18. As a result, new commuters entering as immigrants today not only injure domestic labor but also reduce the number of scarce immigrant slots available for bona fide immigrants desiring to become residents and citizens of this country. Testimony of Richard M. Scammon, former Chairman of Select Commission on Western Hemisphere Immigration, in Hearings on Employment of "Green Card" Aliens During Labor Disputes, *supra*, p. 94.

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

ROBERT BUSTOS, ET AL.

No. 73-480

CRISTOBAL CARDONA, ET AL.,
Petitioners,

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL, ET AL.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae*, in support of the position of the plaintiffs below (cross petitioners and respondents here), is filed by the American Federation of Labor and Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 111 national and international labor unions having a total membership of approximately 14,000,000 working men and women. The

plaintiffs below in this case are members of the United Farm Workers of America, AFL-CIO. Moreover, the AFL-CIO or its affiliates have been parties to the three prior cases in which the Attorney General's practice of allowing the class of aliens commonly called commuters to freely enter this country has been challenged: *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 114 (D.D.C.); *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (C.A.D.C.); *Gooch* v. *Clark*, 433 F.2d 74 (C.A. 9) cert. denied 402 U.S. 995.

The labor movement's interest in and concern over the commuter practice is readily explained. During the last ten years a number of statistical studies have been made as to the economic effect of this practice. The data thus amassed are set out at 115 Cong. Rec. 7731-7742 (1969) and may be briefly summarized as follows. Each year some 40,000 commuters enter this country from Mexico to work in southern Texas, Arizona and California. (115 Cong. Rec. 7736.) The bulk of them enter to take unskilled blue-collar jobs; roughly 40% are farm workers, 9% are laborers, 7% are maids and 6% are hotel and restaurant employees. (115 Cong. Rec. 7738.) These commuters comprise a substantial portion of the workers employed in the border area: they make up 23% of the Brownsville, Texas' total labor force, 17% of El Paso's and 5% of San Diego's. (115 Cong. Rec. 7733.) The border areas consistently show a higher unemployment rate than the remaining portions of Texas, Arizona and California. In the first 6 months of 1967, for example, none of the 13 border areas had a lower unemployment rate than the average for the state, and 7 of them, all in Texas, had an unemployment rate of twice the state-wide average. In border cities such as Laredo, Texas and El Centro, California, unemployment rates exceeding 10% are common. (115 Cong. Rec. 7739.)

As is to be expected in an area of such high unemployment, border wages are low; "industry by industry, county by county, the pattern is the same—earnings in border areas are lower than average earnings in the State." (115 Cong. Rec. 7740.) In Imperial County, Calif., the average weekly nonfarm wage is $20 less than the state average. In Santa Cruz County, Arizona, it is $29 less than the state average. In 9 Texas border counties "it is at least $25 less, and often more." (*Id.*)

Commuters are a major causitive factor of the adverse situation facing domestic workers in border areas. For example, a 1961 Department of Labor survey of Laredo and El Paso, Texas showed that "a large number of unemployed American workers had the same occupational skills as the employed alien commuters." In one instance two garment firms employed 88 commuters as sewing machine operators. At this same time, the files of the "Texas Employment Commission contained applications from 156 unemployed American workers with the same occupation." (115 Cong. Rec. 7733, 7740.) The survey also found that the wages paid by firms employing only American workers were 38% higher than those paid by firms employing alien commuters and that "there were cases where a single firm employing both commuters and Americans would pay the commuters less than the Americans similarly employed." (115 Cong. Rec. 7740.) Thus, as Senator Walter Mondale pointed out:

> "[M]exican aliens, as a group, serve as a readily available low-wage work force which undermines the standards workers generally enjoy throughout the rest of the United States. As a result, the forces of free enterprise are prevented from operating to devlop standards along the border commensurate with normal

> American standards * * * [T]heir employment in this country is clearly detrimental to the economic conditions, the job opportunities, and the organizing and collective bargaining efforts of American workers, because they have little or no stake in the resolution of domestic labor disputes. Indeed, it is clear that these nonresident commuters, as well as illegal entrants, are widely used as strikebreakers." (115 Cong. Rec. 7742.)

The basis upon which the AFL-CIO determined to state its views to this Court is equally straightforward. We agree with the points made in the thorough and painstaking brief filed in this Court by the plaintiffs below. That brief, however, places its main reliance on the 1965 amendments to the Immigration and Nationality Act of 1952, rather than on the modifications to the prior law made in the Act itself. It is our view that what Congress did in 1952, standing alone, requires judicial disapproval of the commuter practice. That, too, was the conclusion of Judge Eugene Wright in his dissent in *Gooch* v. *Clark*, *supra*, 433 F.2d at 82-88. The argument we develop herein is therefore devoted to an exposition of the conclusions to be drawn from the 1952 Act. The focus of that discussion will be Judge Wright's closely reasoned dissent in *Gooch*, the substance of which, we submit, warrants adoption by this Court.

ARGUMENT

Congress, in the Immigration and Nationality Act of 1952, as amended, has stated the rules governing the entry of "aliens"[1] into the United States. That Act "charge[s] * * * the Attorney General * * * with the administration and enforcement" of those rules. (8 USC § 1103.) In ful-

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[1] "Any person not a citizen or national of the United States." (8 U.S.C. § 1101(a)(3).)

filling that charge the Attorney General is, of course, obliged to conform his actions to the rules Congress has mandated. We shall now demonstrate that the Attorney General has failed that obligation by permitting entry of a class of aliens, commonly called "commuters," that the Act renders ineligible for admission.[2]

1. We begin that demonstration by considering the language and structure of the Act. A "commuter" is an alien whose sole permanent residence is in Mexico or Canada and who is permitted by the Attorney General to enter the United States to work in this country on a daily or seasonal basis as an "immigrant"[3] exempt from the valid unexpired visa requirement imposed by 8 U.S.C. § 1181(a).[4] The sole

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[2] "According to an I. & N.S. survey, most commuters who enter the United States are farmworkers, general laborers, or domestics, all of whom are in competition with petitioners. *See* 115 Cong.Rec. 7737-7738 (1969). At the present time the Secretary of Labor will not certify that such workers are in short supply in the United States, or that the admission of aliens for such purposes will not adversely affect wages and working conditions here. 29 C.F.R. § 60(a)(2) (1970). Hence under § 1182(a)(14) of the Act, such aliens are ineligible for visas as special immigrants. Unless they can enter without a visa as commuters, therefore, they cannot enter the United States at all. (Skilled workers, whose trades are in short supply in this country, have no difficulty obtaining visas as special immigrants; elimination of the commuter status would make no difference to them.)" *Gooch* v. *Clark*, 433 F.2d 74, 82 (C.A.9) cert. denied 402 U.S. 995 (Eugene Wright, J., dissenting).

[3] "Every alien except an alien who is within one of [12 enumerated] classes of non-immigrant aliens." (8 U.S.C. § 1101(a)(15).)

[4] "Except as provided in subsection (b) of this section no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent * * *." (8 U.S.C. § 1181(a).)

exception to the documentation requirement of §1181(a) is that

> "returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation." (8 U.S.C. § 1181(b).)[5]

Thus, the *only* immigrants lacking a valid unexpired visa the Attorney General is authorized to admit into this country are "returning resident immigrants defined in section 1101(a)(21)(B)." For the Attorney General to prevail here he must therefore establish that a commuter, who by definition has his sole permanent residence in Mexico or Canada, and who enters the United States solely to work is a "returning [United States] resident." Given the utter incongruity of that conclusion on its face it is not surprising that the Attorney General can not do so.

The definition of the term "returning resident immigrants" to which the §1181(b) exception is keyed is:

> "An immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit

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[5] From 1952 until 1965 § 1181(b) provided for informal readmission of "aliens lawfully admitted for permanent residence who depart from the United States temporarily." It is our view that this change in language need not be accorded significance for the plaintiffs below to prevail here. For, from 1952 until 1965, as today, the crux of this case is the proper construction of the term "lawfully admitted for permanent residence." (See pp. 7-15, *infra*.) While we do not develop the point we note, however, that the plaintiffs below have argued throughout that this change does provide support for the proposition that the Attorney General's action in permitting commuters to enter the United States contravenes the Act.

abroad." (8 U.S.C. § 1101(a)(27)(B).)

That section, by its use of the phrase "lawfully admitted for permanent residence," in turn incorporates by reference 8 U.S.C. § 1101(a)(2). For, "Section 1101(a)(20) defines precisely the term 'lawfully admitted for permanent residence.' This term has especial significance because of its application to numerous provisions of the bill." (H. Rep. 1365, 82nd Cong., 2nd Sess., p. 32.) Section 1101(a)(20) states:

> "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

Insofar as he treats with the language of the Act at all, the Attorney General rests his case on the following reading of § 1101(a)(20):

> "Upon lawful admission as an immigrant, an alien acquires a *status* which gives him the *privilege* of residing permanently in the United States. So long as that status is not changed, the alien who has been lawfully admitted for permanent residence retains the privilege of establishing a permanent residence in this country.[15] * * * [A]s the Ninth Circuit correctly observed in *Gooch* v. *Clark, supra*, 433 F.2d at 79, the reservation in 8 U.S.C. 1101(a)(20) concerning 'such status not having changed' refers primarily to the change of status from that of an immigrant lawfully admitted for permanent residence to that of a nonimmigrant, pursuant to 8 U.S.C. 1257. *See Matter of S.*, 6 I&N Dec. 392 (Attorney General); *Matter of M.P.*, 9 I&N Dec. 747. Lawful residence status may also be lost if the returning immigrant reenters surreptitiously. *Matter of M.*, 5 I&N Dec. 642. And an alien with

lawful residence status may be refused readmission if his reentry is barred on a substantive ground specified in the statute. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Karpay* v. *Uhl*, 70 F.2d 792 (C.A. 2). But there is no basis in the statutory language or purpose for an assumption that status as an immigrant lawfully admitted for permanent residence is lost or abandoned by failure to establish a home in the United States.

"[15] Since the commuter's status is tied to continued employment in this country, it has been the administrative view that such status is lost if the commuter is out of such employment for a period of six months, unless the unemployment was caused by uncontrollable circumstances, such as serious illness, disabling injury, or pregnancy. *Matter of D.C.*, 3 I&N Dec. 519; *Matter of L.*, 4 I&N Dec. 454 (1951); *Matter of Burciaga-Salcedo*, 11 I&N Dec. 665 (1966); *Matter of M.D.S.*, 8 I&N Dec. 209; *Matter of Wighton*, 13 I&N Dec. 683."

(Fed. Parties Br. pp. 25-26; emphasis in original.)

In other words, the Attorney General argues that the issuance of a valid visa to an alien creates in that individual a lifetime status as an immigrant "lawfully admitted for permanent residence" (within the meaning of § 1101 (a)(20)) which is subject to forfeiture on the limited grounds stated in his brief but not on the ground that the immigrant has not established or maintained a permanent residence in the United States.

This argument suffers from two fatal flaws. First, while it is pressed for the purpose of this litigation, it is inconsistent with the Attorney General's original understanding. In his dissent in *Gooch v. Clark*, Judge Wright traced the evolution of the Attorney General's efforts to provide a rationale for the commuter practice. For the Court's conve-

nience we set out that portion of his opinion in the margin.[6]

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[6] "I think it important to point out that we are not presented here with any consistent or coherent interpretation of the sort to which courts have traditionally deferred. *Cf.* Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933). Indeed, to the extent that the Service has in the past advanced any consistent interpretation of the Immigration Act, that interpretation has been directly in conflict with the Service's position in this case.

"It is of course true that the Service has since 1952 continued to admit commuters to the United States without requiring entry visas. But the Service itself has admitted that the real basis of the practice is not statutory command but administrative fiat:

> 'The commuter situation *manifestly does not fit into any precise category found in the immigration statutes.* The status is an artificial one, predicted upon good international relations maintained and cherished between friendly neighbors.'

Matter of M—D—S— et al., 8 I. & N. Dec. 209, 213 (1958) (emphasis supplied).

"Nor has the Service sought to legitimize this essentially lawless position by regulations describing and controlling the operations of the commuter system. Prior to 1952, of course, such regulations existed. But they were repealed upon passage of the Immigration Act and never again republished—eloquent testimony, in and of itself, to rebut the Service's current view that Congress in 1952 intended no change in the commuter practice.

"Despite the absence of regulations, however, commuters continued to cross the border freely. The Service took the position that the 1952 Act had not disturbed 'the practice of considering commuters as permanent residents,' and relied on the 'fiction of a commuter's permanent United States residence coinciding with his place of employment.' Matter of H— O—, 5 I. & N. Dec. 716, 718-19 & n. 13 (1954).

"This position was formalized in a regulation issued in 1957 which, with changes not material here, remained in force until 1966. It read as follows:

> '§ 211.1 Visas. A valid, unexpired immigrant visa shall be presented by each arriving immigrant alien except an immigrant who (a) was born subsequent to the issuance of an immigrant visa to his accompanying parent and applies for admission during the validity of such visa, or (b) *is returning to an unrelinquished lawful permanent residence* after a temporary absence abroad (1) not ex-

As Judge Wright demonstrates, the Attorney General, contrary to his present argument, initially recognized that an immigrant's "abandon[ment of] his status of a permanent resident in the United States" does render that immigrant inadmissible "without again qualifying for admission as a permanent resident." (*Matter of M-D-S- et al.*, 8 I.&N. Dec. 209.) But he sought to escape the force of that recognition by adoption of the fiction that maintenance of permanent employment in the United States is sufficient to pre-

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ceeding one year and present a Form I-151 alien registration receipt card duly issued to him, or (2) presents a valid unexpired re-entry permit duly issued to him, or (3) satisfies the district director in charge of the port of entry that there is good cause for the failure to present the required document, in which case an application for waiver shall be made on Form I-193.'

22 Fed.Reg. 6377 (1957) (emphasis supplied).

"The regulation is plainly inconsistent with the Service's present position. It clearly forbids the entry without a valid or re-entry permit of any immigrant not returning to an 'unrelinquished lawful permanent residence' in the United States, and thus makes the privilege of using a Form I-151 to gain entry dependent upon actual residence in the United States. It is compatible with the commuter practice, which continued during the years 1957-66, only on the assumption, apparently made by the Service, that a commuter's place of employment constitutes an unrelinquished lawful permanent residence in the United States.

"The same view of the Act was taken by the Service in the 1958 decision in Matter of M— D— S—, et al., *supra*. That was an appeal by the District Director from a finding by the Special Inquiry Officer that certain alien commuters had been improperly excluded. The aliens had been issued immigrant visas, had used them to acquire Forms I-151, and had until a little more than six months previously been employed in the United States and admitted as commuters. When they sought to gain entry into the United States, they presented their still valid Forms I-151. The District Directors, however, excluded them on the grounds that they could not claim commuter status if they had had no United States employment for six months previously.

"The Special Inquiry Officer, adopting essentially the position now urged by the Service, ruled that since the aliens had

serve an immigrant's "status of a permanent resident in the United States." The Act, however, defines the terms "permanent" and "residence" as an individual's "principal actual dwelling place in fact without regard to intent" on a "continuing or lasting" basis. (See 8 U.S.C. §§ 1101(a) (31) & (33).) Thus, this fiction could not be squared with the Act, and was abandoned after being rejected in *Amalgamated Meatcutters* v. *Rogers*, 186 F. Supp. 114 (D.D.C.), in favor of the rationalization presented in the brief for the Federal Parties filed with this Court.

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been lawfully admitted for permanent residence, they were entitled to use the Form I-151 as long as the latter was valid—at that time as now one year. But the Board of Immigration Appeals reversed, holding that by being unemployed for six months the commuters had 'abandoned [their] status of permanent resident[s].' 8 I. N. Dec. at 213. Once again, therefore, the Service expressed its understanding that actual residence in the United States was essential to the commuter's status as an alien lawfully admitted for permanent residence but that the commuter's place of employment was such a residence.

"This view of the Act was also the Service's litigating position before Judge Youngdahl in the *Amalgamated Meat Cutters* case. *See* Memorandum in Support of Defendants' Motion to Dismiss at 10; Note, Aliens in the Fields, 21 Stan. L.Rev. 1750, 1755 (1969). But here the Service encountered a well-deserved rebuff. Judge Youngdahl pointed out that the Immigration Act itself defined 'residence' as a person's 'place of general abode * * * his principal, actual dwelling place in fact, without regard to intent.' 8 U.S.C. § 1101(a)(33). The language of the Act was obviously irreconcilable with any contention that a commuter's place of employment could constitute a residence. Judge Youngdahl therefore rejected the Service's position. 186 F.Supp. at 118-119.

"Faced with this check, the Service was obliged 'to reexamine the provisions of the 1952 Act, * * * and to adopt a new theory of the legal basis for the commuter practice.' Note, *supra*, 21 Stan.L.Rev. at 1757. Hence, when the commuter practice once again came under attack in Texas State AFL-CIO v. Kennedy, 117 U.S.App.D.C. 343, 330 F.2d 217 (1964), the Service was ready with the theory it now advances—that the commuter was not required to establish any residence in the United States, either fictitious or actual." (433 F.2d at 87-88.)

Second, the Act makes perfect sense so long as the privilege of entry without the necessity of presenting a visa granted in § 1181(b) is limited to true resident immigrants; in contrast the court below recognized that:

> "As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case, the construction of 'lawfully admitted for permanent residence' as including commuters 'makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B), and is contrary to the plain meaning of two others.'" (481 F.2d at 843; footnote omitted.)

Once again, for the Court's convenience, at this point we set out in full in the margin, and despite its length, a portion of Judge Wright's dissent in *Gooch*—in this instance his masterful exposition of the absurdities which follow from the Attorney General's litigating position as to the meaning of § 1101(a)(20).[7] The Attorney General's sole

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[7] "Take first § 1182(h) and § 1182(i). These sections provide for waiver by the Attorney General, under certain circumstances, of the ban against entry of aliens who have been convicted of a crime or who have procured entry documents by fraud. In both cases the Attorney General may grant waiver only if the alien is the spouse, child, or parent of 'a United States citizen or of an alien lawfully admitted for permanent residence.' If an alien lawfully admitted for permanent residence is taken to be one who actually resides or actually intends to reside in the United States, then the sections embody a humanitarian, family-maintaining policy for residents of the United States. But I can think of no reason why Congress would choose to extend favored treatment, for example, to a Mexican convicted of a crime, simply because he was the parent of a commuter resident in Tijuana.

"Or take § 1182(a)(14). Read together with § 1101(a)(27)(A), the effect is to provide that a Mexican laborer seeking to enter the United States as a special immigrant (*not* as a commuter) must receive Labor Department certification unless he is the parent, child, or spouse of a United States citizen or of

response is:

"Whether the statutory phrase [defined in § 1101(a)-(20)] must be read to include commuters in contexts other than the commuter's status for purposes of readmission to the United States has not been presented to

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an alien lawfully admitted for permanent residence. Once again, this is a sensible and humanitarian policy if the laborer's relatives actually reside in the United States. But why would Congress want to allow a Mexican laborer into the country as a special immigrant without certification, simply because his son is a commuter—by definition a resident of Mexico?

"There are similar examples in other contexts. Thus § 1153 (a)(2) awards second preference visas to the spouse, unmarried son or unmarried daughter of an alien lawfully admitted for permanent residence. No doubt few visas would be awarded to commuter families under this provision, since immigrants born in the Western Hemisphere are exempt from the numerical limitations on entry. § 1153(a). But it remains hard to see why Congress would want to give special preference to the children born abroad of parents who emigrate to Canada or Mexico and become commuters.

"Finally, § 1251(f) forbids the deportation of an alien who procured entry by fraud, if he is the spouse, parent, or child of a citizen or of an alien lawfully admitted for permanent residence. Would this court really construe § 1251(f) as forbidding the deportation of a Mexican who had procured entry by fraud, simply because he had a son who was a commuter resident in Tijuana? I cannot believe we would, but if the majority opinion is correct we would be obliged to.

"So far I have discussed only the untoward consequences for other sections of the Act that flow from the majority's actual holding in this case—that commuters are lawfully admitted for permanent residence. The reasoning of the majority, however, leads to consequences still more absurd than the actual holding.

"The majority argues that commuters are lawfully admitted for permanent residence simply because 'each of them at one time received a valid immigration visa.' If this is correct, it follows that all of the thousands of people, all over the world, who have ever received a valid immigration visa, also qualify as aliens lawfully admitted for permanent residence. Such aliens would not of course be commuters, since never having come to this country they could not be said to be 'returning from a temporary visit abroad' and would be ineligible to use Form I-151 as an entry document. But since according to the majority they were lawfully admitted for

the Service and need not be resolved in this case. The interpretation of the phrase in other sections of the Act will, of course, depend upon the legislative purpose expressed by those sections." (Fed. Parties' brief, p. 28.)

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permanent residence, they are entitled to the benefits which that status confers.

"Thus their relatives who have been convicted of crimes are entitled to specially favorable treatment. § 1182(h). Their relatives who enter this country by fraudulent means may not be deported. § 1251(f). If they were born in the Western Hemisphere, their relatives may enter as special immigrants without certification by the Secretary of Labor. § 1182(a)(14). Most startling of all, the unmarried sons and daughters of such aliens are entitled to second preference visas even though the alien himself might have been eligible for no preference whatsoever. And all these consequences follow even if the alien 'lawfully admitted' never leaves his homeland. If Congress intended such a result, it chose an odd way of saying so.

"Two other sections of the Act also suggest strongly that the majority is incorrect in making 'lawfully admitted for permanent residence' turn solely on the fact that an immigration visa was issued without regard to the residence or intended residence of the alien. The first is § 1182(g). That section grants privileges to the parent or unmarried son or daughter of 'a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa.' If the majority position is correct, then the entire last phrase is surpulsage, since any alien who has been issued an immigrant visa is an alien lawfully admitted for permanent residence. Congress, however, seems to have thought the categories distinct.

"Second is the definition of the border-crossing card in § 1101(a)(6). The statute there distinguishes between an 'alien lawfully admitted for permanent residence' and an 'alien resident in foreign contiguous territory.' If one accepts the Service's construction of 'lawfully admitted for permanent residence,' I suppose that it is possible to give some meaning to the second phrase by construing it as applicable to non-immigrants. But the question before us is precisely *whether* the Government's construction of the statute is correct. And, approaching § 1101(a)(6) with an open mind, it would certainly appear that the plain meaning of the words indicates that an 'alien lawfully admitted for permanent residence' is *not* an 'alien resident in foreign contiguous territory.' " (433 F.2d at 84-85.)

But, Judge Wright anticipated that response and provided the complete answer to it:

> "The authors of the Act took the trouble carefully to define the term, § 1101(a) (20), and stated that a precise definition was necessary since 'this term has especial significance because of its application to numerous provisions of the bill.' H.R. Rep. No. 1365, 82d Cong., 2d Sess., 1952 U.S. Cong. & Adm. News, pp. 1653, 1684. Congress could not have made clearer its intention that the term be give a uniform significance throughout the Act. We are thus not at liberty to adopt one meaning of 'lawfully admitted for permanent residence' in § 1101(a)(27)(B) and another in the other sections where the phrase appears: if commuters are lawfully admitted for permanent residence for purposes of § 1101(a)(27)(B), then they must be lawfully admited for permanent residence for purposes of all other sections of the Act." (433 F.2d at 83.)

What emerges from Judge Wright's anlaysis is that § 1181(b) is simply one manifestation of the special solicitude Congress has evinced throughout the Act for true resident immigrants who, as this Court has noted, have frequently "lived in this country for substantial periods" thereby "establishing strong * * * family, social and economic ties here * * *." (*Woodby* v. *Immigration Service*, 385 U.S. 276, 286.) A commuter, of course, does not have all of those ties that bind.

2. In apparent recognition that the language and structure of the 1952 Act are squarely contrary to his position the Attorney General places his main reliance on the proposition that the language of 8 U.S.C. § 1181(b)[8] is "similar

[8] As passed in 1952 this provision authorized waiver of the visa requirement for "aliens lawfully admitted for permanent residence who depart from the United States temporarily." For the present language see p. 6 *supra*.

to that [of § 13(b) of the 1924 Act [9]] and obviously was designed to conform with the interpretation of the prior statute." (Fed. Parties' Br. pp. 32-33.) This is the statutory premise for his elaborate argument that Congress has "in effect * * * ratified" the commuter practice. (Fed. Parties' Br. pp. 39-63.) But the 1952 Act did not reenact § 13(b), it made a vital change in the exception to the visa requirement. Rather than according that special privilege to "immigrants who have been legally admitted," the 1952 Act accorded that privilege to immigrants "lawfully admitted for permanent residence," which term it defined with particularity. We have already discussed the ramifications of that definition, and have demonstrated that it requires the result for which the plaintiffs below contend. (Pp. 5-15, *supra.*)

We are, of course, well aware that construing statutes is not a grammar lesson or a scholastic exercise but rather an endeavor to ascertain the legislative will. (See, e.g., *Woodwork Mfrs. Assn.* v. *NLRB,* 386 U.S. 612, 619-620.) But when the language and structure of an act point in one direction surely the least that is required if the opposite direction is to be taken is some affirmative indication that Congress has not meant what the legislation it has passed appears to say. The approach consistent with reason is that where legislation in terms repudiates a prior administrative practice, that practice is thereby overruled unless there is some clear indication in the legislative history that Congress, nonetheless, did intend to preserve it. Otherwise the absence of legislative history *restating* that which is

[9] The 1924 Act waived the visa requirement for "immigrants who have been legally admitted to the United States and who depart therefrom temporarily."

plainly and unequivocally stated in the law becomes decisive. Placing such a burden of reiteration on the legislature would, of course, be an absurdity.

Thus, we believe that the decisive point here is that there is not a word in the 1952 Act, the House Report, the Conference Report or the debates which so much as imply a desire on the part of Congress to sanction the commuter practice. The Attorney General's brave statement that § 1181(b) "clearly was designed to conform with the interpretion of the prior statutes" (Fed. Parties Br. p. 33) is fatally lacking in any support in the legislative record. He builds his case on the proposition that Congress has "in effect * * * ratified" the commuter practice (Fed. Parties Br. p. 39), but he fails to present any proof of that proposition—for there is none.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below in No. 73-300 should be affirmed and the judgment below in No. 73-480 should be reversed.

Respectfully submitted,

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August, 1974.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SAXBE, ATTORNEY GENERAL, ET AL. *v.* BUSTOS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–300. Argued October 17, 1974—Decided November 25, 1974*

Some aliens who live in Mexico and Canada commute to work in the United States. The Immigration and Naturalization Service has approved this practice with respect to both daily and seasonal commuters, and has classified such aliens as immigrants "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad," a category of "special immigrant" defined by the Immigration and Nationality Act, 8 U. S. C. § 1101 (a)(27)(B). Those with that classification have freedom from usual documentation and numerical requirements and from the labor certification requirements of 8 U. S. C. § 1182 (a)(14). Certain farmworkers and a collective-bargaining agent for farmworkers brought this suit for declaratory and injunctive relief against the practice of thus classifying such alien commuters. The District Court dismissed the action. The Court of Appeals upheld the classification as to daily commuters but rejected it as to seasonal commuters. *Held:* Alien commuters are immigrants who are "lawfully admitted for permanent residence," and are "returning from a temporary visit abroad" when they enter the United States, and this "special immigrant" classification is applicable to both daily and seasonal commuters. This has long been the administrative construction of the statute in the context of alien commuters, a factor which must be accorded great weight when, as here, congress has considered the subject and has not seen fit to alter the administrative practice. Pp. 4–15.

— U. S. App. D. C. —, 481 F. 2d 479, affirmed in part and reversed in part.

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*Together with No. 73–480, *Cardona et al.* v. *Saxbe, Attorney General, et al.*, also on certiorari to the same court.

Syllabus

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 73–300 AND 73–480

William B. Saxbe, Attorney General, et al., Petitioners, 73–300 *v.* Robert Bustos et al. Cristobal Cardona et al., Petitioners, 73–480 *v.* William B. Saxbe, Attorney General, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[November 25, 1974]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Some aliens who have their homes in Canada or Mexico commute *daily* to places of employment in this country and others do so on a *seasonal* basis, a practice permitted by the Immigration and Naturalization Service. The question is whether the practice on the facts of these cases conforms with the Immigration and Nationality Act. It turns on the meaning of 8 U. S. C. § 1101 (a)(27)(B) which defines as one variety of "special immigrant" an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."

Those who qualify under § 1101 (a)(27)(B) may be permitted entry without the usual documentation requirements. 8 U. S. C. § 1181 (b). The Regulations[1] implement § 1181 (b) by allowing such an immigrant to use a re-entry permit, normally called a "green card," in

[1] 8 CFR § 211.1.

lieu of an immigrant visa and without regard to numerical limitations[2] if he is "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year."

The Act presumes that an alien is an immigrant "until he establishes . . . that he is entitled to a nonimmigrant status";[3] and it defines "immigrant" as every alien who cannot bring himself into an enumerated class of nonimmigrants.[4] One class of nonimmigrants[5] is: "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."

An alien does not qualify as a *nonimmigrant* under this class of nonimmigrants if he seeks to perform temporary labor at a time when unemployed persons capable of performing that labor can be found in this country.[6] If he cannot qualify as a nonimmigrant some other way, such an alien is subject to the Act's numerical limitations, unless he is included in the classes of "immediate relatives" of a United States citizen or "special immigrants." On the other hand, as already noted, one variety of "special immigrant" is an alien "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[8] One who so qualifies is excluded

[2] 8 U. S. C. § 1181 (a) and 8 U. S. C. §§ 1151–1153.

[3] *Id.*, § 1184 (b).

[4] *Id.*, § 1101 (a)(15).

[5] *Id.*, §1101 (a)(15)(H). Legislation proposed in 1973 would limit these nonimmigrants to one year with possible extension to two years. H. R. Rep. No. 93–461, 93d Cong., 1st Sess., p. 16.

[6] *Id.*, § 1101 (a)(15)(H)(ii).

[7] *Id.*, § 1151 (a).

[8] *Id.*, § 1101 (a)(27)(B). The 1973 H. R. Rep., *supra*, n. 5, recognizes the difference between a "special immigrant" and nonimmigrants covered by § 1101 (a)(15)(H). *Id.*, at 16.

from the labor certification provisions in 8 U. S. C. § 1182 (a)(14).[9] The term "lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . . such status not having changed."[10] An alien achieves that *status* in the first instance by complying with any applicable numerical limitations and with the Act's other requirements for admission, details not important here. After his initial admission on that basis, he is free to leave this country temporarily and to re-enter without regard to numerical limitations. The Act authorizes the Attorney General to re-admit such an alien without a visa or other formal documentation. 8 U. S. C. § 1181 (b). He has exercised that authority, allowing such an immigrant to return with what was called in the briefs and oral argument as the "green card."

This suit was brought by the United Farm Workers Organizing Committee[11] for declaratory and injunctive relief against the practice of giving alien commuters the documentation and labor certification benefits of classification as immigrants "lawfully admitted for permanent

[9] 8 U. S. C. § 1182 (a)(14) provides in relevant part:

"Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similiarly employed.

[10] *Id.*, § 1101 (a)(20).

[11] A collective-bargaining agent for farm workers. Two farm laborers were also plaintiffs and four more intervened in the District Court.

residence" who are "returning from a temporary visit abroad." [12] The District Court dismissed the action without opinion. The Court of Appeals held that the admission of *daily* commuters was proper but that the admission of *seasonal* commuters was not, 481 F. 2d 479. We granted the petition and cross-petition in light of a conflict between the decision below and that of the Ninth Circuit Court of Appeals in *Gooch* v. *Clark*, 433 F. 2d 74 (1970).

Our conclusions are that commuters are immigrants, that they are "lawfully admitted for permanent residence," and that they are "returning from a temporary visit abroad" when they enter the United States. Moreover, the wording and legislative history of the statute and the long administrative construction indicate that the same treatment is appropriate for both daily and seasonal commuters. Commuters are thus different from those groups of aliens who can be admitted only on certification by the Secretary of Labor that unemployed persons cannot be found in this country and that the employment of the aliens "will not adversely affect the wages and working conditions of the workers in the United States." 8 U. S. C. § 1182 (a)(14). We thus agree with the conclusion of the Ninth Circuit Court of Appeals in *Gooch*. Accordingly we affirm the judgment now before us as respects *daily* commuters and reverse it as respects *seasonal* commuters.

A main reliance of plaintiffs is on the provision of

[12] In the District Court and the Court of Appeals plaintiffs also argued that 8 CFR § 211.1 (b)(1) should be read to preclude the entry of a commuter to work at a place where a labor dispute exists, even if the commuter has previously been employed there. This claim was not decided by the Court of Appeals and was not presented in plaintiffs' petition for certiorari. Hence we offer no views on the merits of this claim.

the Act [13] which in the much discussed subsection (15)(H)(ii) provides that one category of alien nonimmigrant is "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." Under the argument tendered, these alien commuters partially meet the definition of nonimmigrants in subsection (15)(H)(ii) of the Act in that they have a foreign residence which they do not intend to abandon and come here temporarily to perform temporary service, but fail to satisfy subsection (15)(H)(ii) completely in that they do not show that unemployed people capable of performing the services cannot be found in this Nation. That should invoke the presumption in the Act, already noted, that an alien is an immigrant until or unless he proves he is a nonimmigrant.[14]

We agree moreover with the Ninth Circuit that this provision "was intended to confer non-immigrant status on certain aliens who were needed in the American labor force but who, unlike commuters, would be unable to achieve admittance under immigrant status." 433 F. 2d, at 78. The administrative construction of this subsection (15)(H)(ii) by the Immigration Service [15] has been that it does not cover an alien, like the commuter, who has a "permanent residence" here and who comes to perform a job of a permanent character, even though the period of his service is limited. To repeat, the Act provides that "every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular office . . . and the immigration officers . . . that he is

[13] 8 U. S. C. § 1101 (a)(15)(H).

[14] *Id.*, § 1184 (b).

[15] Matter of Contopoulos, 10 I. & N. Dec. 654.

entitled to a nonimmigrant status under section 1109 (a) (15)." [16] Before an alien can be classified as a *nonimmigrant* under subsection (15)(H)(ii) his prospective employer must submit a petition on his behalf under 8 U. S. C. § 1184 (c); and after INS approves the petition, the alien must apply for *nonimmigrant* status and demonstrate that he in fact qualifies for that status.[17]

We conclude that commuters are not nonimmigrants under subsection (15)(H)(ii). None of the other categories of nonimmigrants are applicable, and thus under § 1184 (b) the commuters are immigrants.

The fact that an alien commuter who has not shown he must be classified as a *nonimmigrant* must be classified as an immigrant is not the end of our problem. The question remains whether he may properly be treated as one who is in the group defined as "special immigrants" under subsection (27)(B),[18] that is, whether commuters are "lawfully admitted for permanent residence" when they have no actual residence in this country.

Section 1101 (a)(20), defines "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such *status* not having changed" (italics added). The definition makes the phrase descripitive of a *status* or *privilege* which need not be reduced to a permanent residence to be satisfied, so long as that *status* has not changed.

One argument of the plaintiffs is that the *status* has changed because residence in this country was never claimed. But we read the Act as did the Ninth Circuit

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[16] 8 U. S. C. § 1184 (b).

[17] 1 Gordon & Rosenfield, Immigration Law and Procedure, § 2.14b.

[18] The subsection is in 8 U. S. C. § 1101 (a).

Court of Appeals in the *Gooch* case to mean that the change in *status* which Congress had in mind was a change from an immigrant lawfully admitted for permanent residence to the status of a *nonimmigrant* pursuant to 8 U. S. C. § 1257. 433 F. 2d, at 79.

The *status* referred to in § 1101 (a)(20) is acquired when an alien satisfies (1) any numerical limitations on the entry of immigrants,[19] (2) requirements as to qualitative matters such as health, morals, and economic status,[20] and (3) the need for an immigrant visa.[21] The applicant must also state whether he plans to remain in the United States permanently.[22] But the Act does not declare or suggest that the *status* will be denied him, if he does not intend to reside permanently here. As we read the Act, the "*status*" acquired carries several important privileges: He may remain in the United States indefinitely; he is free to work in this country; he may return to this country after a temporary absence abroad; and he has the privilege of establishing a permanent residence in the United States.

Thus we conclude that commuters are immigrants "lawfully admitted for permanent residence." As did both the majority and dissent in *Gooch*, we also find that commuters can be viewed as "returning from a temporary visit abroad." 433 F. 2d, at 79–81, 82 n. 1. The court below so agreed as respects daily commuters, disagreeing only as to seasonal commuters. Neither the court below nor the Court of Appeals in *Gooch* took the position now taken in dissent here.

Our conclusion reflects the administrative practice, dating back at least to 1927 when the Bureau of Immigration

[19] 8 U. S. C. § 1151 (a).
[20] *Id.*, § 1182.
[21] *Id.*, §§ 1181 (a), 1201.
[22] *Id.*, § 1202 (a).

was a part of the Department of Labor.[23] In 1940 the Bureau was transferred to the Department of Justice[24] where it remains today. On April 1, 1927 it issued General Order No. 86.[25] Under the order, commuters were

[23] See 32 Stat. 826; 34 Stat. 596; 37 Stat. 736.

[24] By then it was called the Immigration and Naturalization Service. Reorganization Plan No. V, 54 Stat. 1238.

[25] General Order No. 86 reads as follows:

"Subject: Land border crossing procedure

"1. Hereafter aliens residing in foreign continguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens and, provided further, that they are not coming back to seek employment.

"A. Aliens whose original admission occurred prior to June 3, 1921.

"B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

. . . . .

"3. Aliens of all nationalities of the 'immigrant' class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the 'immigrant' class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

"4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

"5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.

[*Footnote 25 is continued on p. 9*]

required to gain admission as immigrants before they could have border crossing privileges. The order provides that "aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." "Thus," said the Court of Appeals in the instant cases, "the daily commuter was born," 481 F. 2d, at 485.

Such long standing administrative construction is entitled to great weight, particularly when as here Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language. *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964); *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915). As the government acknowledges, the meaning of the phrase "lawfully admitted for permanent residence" in § 1101 (a)(27)(b) may not be identical to the meaning of the same language in other sections of the Act where the same history of administrative construction is not present.

"6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

"7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:

"IMMIGRANT

. . . . . .

"10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

. . . . . .

"12. The status of holders of identification cards shall be inquired into periodically . . . . When the holder of a 'non-immigrant' identification card qualifies as an 'immigrant,' a new identification card shall be issued, stamped to show the correct status."

We see no difference in the treatment of *daily* commuters and *seasonal* commuters. The status of the *seasonal* commuter is the same as the status of the *daily* commuter because the identical statutory words cover each. The Court of Appeals, however, rested essentially on a different legislative history of *seasonal* commuters than had been obtained in cases of *daily* commuters.

Prior to 1917 there were essentially no limitations on the practice of commuting from Mexico or Canada to the United States. Legislation was passed in 1917, 1921, and 1924.[26] But under those statutes commuters remained able freely to cross the border subject only to qualitative restrictions in the 1917 Act.

As already noted the administrative approach changed in 1927 when the Bureau of Immigration issued its General Order No. 86. While the 1952 Act, 66 Stat. 163, made no mention of commuters and while the 1965 amendments of the 1952 Act, 79 Stat. 911, were likewise silent as respects commuters, the Court of Appeals assumed that the longstanding practice of allowing *daily* commuters was not repealed *sub silentio;* and we agree. The Court of Appeals, however, took quite a different view of the *seasonal* commuter problem because of its different history.

The *seasonal* commuter problem dates back at least to 1943 when this Government and Mexico agreed to the seasonal importation of Mexican agricultural workers. 56 Stat. 1759. Congress legislated on the problem in 1951,[27] requiring farmers in this Nation to make reasonable efforts to attract domestic workers prior to certification by the Secretary of Labor of the need for foreign labor. That was known as the *bracero* program and the Court of Appeals called the *seasonal* commuter merely a new

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[26] 39 Stat. 874; 42 Stat. 5; 43 Stat. 153.

[27] 65 Stat. 119.

name for the former *bracero*. That is quite inaccurate. The *braceros* were at the start *nonimmigrants;* the *seasonal* commuters were immigrants. Some *braceros*, indeed quite a few, H. R. Rep. No. 722, 88th Cong., 1st Sess., p. 7, acquired permanent residence status. The *seasonal* commuter, like the *daily* commuter, has always been in that category.

In 1964 the *bracero* type of *seasonal* program lapsed; and the next year Congress amended the Immigration and Nationality Act making more strict the certification by the Secretary of Labor of the need for foreign labor and requiring findings on the lack of any adverse effect of the employment of aliens on the wages and working conditions of workers in this country.

But that provision, which we have quoted,[28] does not apply to aliens lawfully admitted for permanent residence returning from a temporary visit abroad and to certain close relatives. An alien who first sought admission *after the effective date of the 1965 Amendment* would need a certificate of the Secretary of Labor; but if he already were an alien lawfully admitted to the United States for permanent residence and returning from a temporary visit abroad, the 1965 amendments would not affect him. The purpose of Congress was to limit *new* admissions of alien laborers, not to prejudice the *status* of aliens who, whether *daily* or *seasonal* commuters, had acquired permanent residence here and were returning to existing jobs.[29]

We have mentioned General Order No. 86 issued on

[28] Note 9, *supra*. See 1 Gordon & Rosenfield, Immigration Law and Procedure, § 2.40

[29] We find in the Reports on the 1965 Act no suggestion that the commuter program was to be uprooted in its entirety, S. Rep. No. 748, 89th Cong., 1st Sess. That report emphasizes the purpose to prevent an "influx" of foreign labor, not to destroy existing labor arrangments. *Id.*, at p. 15.

April 1, 1927, which treated the commuters as immigrants (not *nonimmigrants*), who on obtaining their admission cards would be "considered as having entered for permanent residence." [30] Cf. *Karnuth* v. *United States ex rel. Albro*, 279 U. S. 231, 244.[31] The thrust of General Order 86 was to lift aliens who were natives of Canada and Mexico from the quota provisions for *nonimmigrants*. Thus, they entered from that time down to date, with nonquota immigration visas. That Regulation was carried forward in various regulations before 1952.[32] The practice was reviewed and sustained in various published administrative decisions.[33] Some suggested that the 1952 Act eliminated the alien commuter. The Board of Immigration Appeals, however, reaffirmed the validity of the practice. Matter of H. O., 5 I. & N. Dec. 716 (1954). Thereafter repeated administrative decisions [34] affirmed the adherence to the alien commuter concept. We do not labor the administrative construction phase of these cases further, because when the 1952 Act was reported, the Senate Judiciary Committee tendered a voluminous report of nearly 1,000 pages touching on the alien commuters, describing the practice in some detail, and including the sections which we have discussed in this opinion.

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[30] For the text of General Order No. 86 see n. 25, *supra*.

[31] The aliens in *Karnuth* wanted to be treated as nonimmigrants. One of the categories of nonimmigrants under § 3 of the Immigration Act of 1924, 42 Stat. 5, 153, was defined as "an alien visiting the United States temporarily . . . for business or pleasure." The Court held they did not qualify as laborers for hire.

[32] Immigration Rules, Jan. 1, 1930, Rule 3, Subd. c; 8 CFR § 3.6 (first ed. 1939); 8 CFR § 110.6 (1947 rev.).

[33] Matter of D. C., 3 I. & N., Dec. 519 (1949); Matter of L, 4 I. & N. Dec. 454 (1951).

[34] *Matter of M. D. S.*, 8 I. & N. Dec. 209; *Matter of Bailey*, 11 I. & N. Dec. 466; *Matter of Burciaga-Salcedo*, 11 I. & N. Dec. 665; *Matter of Gerhard*, 12 I. & N. Dec. 556; *Matter of Wighton*, 13 I. & N. Dec. 683; *Matter of Hoffman-Arvayo*, 13 I. & N. Dec. 750.

The commuters from Canada and Mexico were treated as lawfully admitted immigrants. No doubt as to the desirability of the practice was expressed. It is clear that S. Rep. No. 1515, 81st Cong., 2d Sess. (the Omnibus Study Report), reveals a congressional acceptance of the system.

The changes relevant to commuters in the 1965 amendments were, as stated in *Gooch*, minor and technical and contain no suggestion of a change in the commuter problem, 433 F. 2d, at 80, 81. H. R. Rep. No. 745, 89th Cong., 1st Sess.; S. Rep. No. 748, 89th Cong., 1st Sess.

Since 1965 there have been numerous reports by committees of the Congress on the alien commuter problem which indicate that Congress is very knowledgeable about the problem and has not reached a consensus that the administrative policy reaching back at least to General Order No. 86 is wrong. We know from the *Western Hemisphere Report* [35] that the dimensions of the problem are considerable. Daily commuters from Mexico number more than 42,000 of whom 25,000 are engaged in occupations other than agriculture. The total of Canadian commuters exceeds 10,000. Seasonal commuters number at least 8,300 according to the Service's estimate. The U. S. Commission on Civil Rights estimates that if Mexican commuters were cut off, they would lose $50 million annually.[36] The State Department estimates there are 250,000 family members dependent on income earned by commuters [37] and that commuters account for 25% to

[35] Report, Select Commission on Western Hemisphere Immigration, p. 104. See S. Rep. No. 91–93, 91st Cong., 1st Sess., 61–65, stating that the alien commuter problem "can be resolved not by drastically putting an end to the commuter system, but by refining its current operations." See House Committee on the Judiciary, Hearings on H. R. 9112, H. R. 15092, H. R. 17370, 91st Cong., 2d Sess., 205–207.

[36] Report, Stranger in One's Land (1970), p. 12.

[37] Statement, Assistant Secretary of State Oliver to the Senate Subcommittee on Immigration, Sept. 25, 1967, p. 6.

30% of the income earned by the labor force in some Mexican border communities.[38] Termination of the alien commuter practice might well have a great impact on American border communities because the Mexicans who have the *status* of permanent residents could settle here, increasing the problems of housing and education in the border towns this side of the Rio Grande. Former Secretary of State Rogers submitted to the District Court an affidavit stating that any "sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada."

Our conclusion is twofold. First, the provisions of the Act which sanction *daily* commuters are the ones that also support *seasonal* commuters. We would have to read the same language in two opposed ways to sanction the *daily* commuter program and strike down the *seasonal* commuter program. There is no difference in administrative treatment of the two classes of commuters.

Second, if alien commuters are to be abolished or if *seasonal* commuters are to be treated differently than *daily* commuters, the Congress must do it. The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in laws. But the problem of taking all or some alien commuters engaging in farm work out of the Act is not "interstital" or as Mr. Justice Holmes once put it "molecular."[39] It is a massive or "molar" action for which the judiciary is ill-equipped.

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[38] *Id.*, at 4.

[39] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221 (dissenting).

We affirm the Court of Appeals insofar as it held *daily* commuters are lawfully admitted and reverse it insofar as *seasonal* commuters are concerned.

So ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 73–300 AND 73–480

William B. Saxbe, Attorney General, et al., Petitioners, 73–300 *v.* Robert Bustos et al. Cristobal Cardona et al., Petitioners, 73–480 *v.* William B. Saxbe, Attorney General, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[November 25, 1974]

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, dissenting.

The Court, in reaching an interpretation of the immigration statutes which permits a finding that daily and seasonal commuters from Mexico and Canada are "special immigrants" not subject to documentation and numerical restrictions upon entry to this country, contravenes one of the cardinal principles of statutory construction: "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933) (Cardozo, J.). Administrative construction over a long period of time is an available tool for judicial interpretation of a statute *only* when the statutory terms are doubtful or ambiguous. *United States* v. *Southern Ute Tribe or Band of Indians*, 402 U. S. 159, 173, n. 8 (1971); *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 52 (1939); *Norwegian Nitrogen Products Co.* v. *United States, supra.*

In light of the characteristics of the aliens whose status is in question and the ordinary meaning of the very specific terms Congress used in these immigration statutes, this principle applies with force here.

I

Daily and seasonal commuters both reside *in fact* in either Mexico or Canada and cross the border into this country either daily or seasonally to work.[1] The daily commuter's defining characteristic is his limited presence in this country; he comes across the border to work each day and returns to his actual dwelling place in Mexico or Canada when his work is done. The seasonal commuter, in contrast, remains in this country continuously during the seasons in which he works here, but then absents himself completely for the remaining portions of the year. For the Court to reach its result, it must undertake the unlikely project of demonstrating that these aliens are in legal effect *permanent residents* of the United States under the immigration laws.

To qualify as a "special immigrant" given dispensations from normal documentation requirements and numerical limitations, a commuter must be "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." 8 U. S. C. § 1101 (a)(27)(B). The included phrase "lawfully admitted for permanent residence" means in turn "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the

[1] Counsel for the Government indicated at oral argument that commuters actually form a spectrum rather than two hard and fast categories. Some commuters stay in this country for whole seasons and then switch later to daily commuting. Some daily commuters come across the border less regularly than every workday, and sometimes seek only temporary employment and switch employers. Tr. of Oral Arg., at 18, 52, 54.

immigration laws, such status not having changed." 8 U. S. C. § 1101 (a)(20). The immigration laws define "permanent residence" as "the place of general abode," a person's "principal, actual dwelling place in fact, without regard to intent," 8 U. S. C. § 1101 (a)(33), with the relationship of the person to the place of residence being "of continuing or lasting nature, as distinguished from temporary . . . ." 8 U. S. C. § 1101 (a)(31). Under the Immigration and Naturalization Service's own regulations, in order to be exempt from the normal documentation requirements upon entry, an alien must be returning to his "unrelinquished lawful permanent residence" from a "temporary absence abroad." 8 CFR § 211.1 (b) (1974). On its face, the present practice of the Service is flatly contrary to its own regulation.

Confronted with the obvious difficulty that this statutory language defining permanent resident status and the regulations will not accommodate the daily and seasonal commuters,[2] the majority, without the aid of legislative history, contends that these plain words should be given special, technical meanings:

> "Section 1101 (a)(20) . . . defines 'lawfully admitted for permanent residence' as 'the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such *status* not having changed' (italics added). The definition makes the phrase descriptive of a *status* or *privilege:*

[2] Strain between the statute and the administrative practice is also evident in the need for the Government to fit the daily commuter's trip each day from his *home* in Mexico or Canada to his workplace in this country as a return to this country "from a temporary *visit abroad.*" 8 U. S. C. § 1101 (a)(27)(B) (emphasis added). As indicated in the text, the regulations refer to a return to "an unrelinquished lawful permanent residence" in this country from "a temporary absence abroad . . . ." 8 CFR § 211.1 (b) (1974).

which need not be reduced to permanent residence to be satisfied, so long as that *status* has not changed." *Ante,* at 6 (italics supplied by the Court).

The use of italics will not alter the ordinary meaning of the statutory terminology, however, and the Court gives no basis for believing that Congress intended something other than the ordinary meaning of the words it used. No one could reasonably suggest that Congress was seeking to accommodate the commuters when it enacted these definitions and to provide special status to those who do not reside and do not intend to reside in this country. Clearly it was dealing with those aliens who seek permanent resident status in this country and who fulfill that intention.

Since the language of the statute simply will not bend to allow the proposition which the Government and the Court adopt—that in defining "lawfully admitted for permanent residence" Congress meant to include persons who have never intended to reside permanently in this country, who do not currently reside in this country, and who never will become actual permanent residents [3]—the ultimate rationale for the decision must be that the plain

[3] In an effort to make the facts fit the statute, the Court of Appeals found that the commuter's place of work could be considered his permanent residence. 481 F. 2d 479, 486 (1973). Others have noted the "logical inconsistency" and the lack of a precise fit between the practice and the law but have justified the discordance by citing "practical needs and considerations of foreign policy." 1 Gordon & Rosenfield, Immigration Law and Procedure § 2.19, at 2–105–2–106 (1973 Supp.). The practice has been viewed as an "amiable fiction" and the product of "administrative ingenuity." *Id.*, § 2.8b, at 2–43 (1974). The Board of Immigration Appeals has similarly acknowledged that the commuter practice "manifestly does not fit into any precise category found in the immigration statutes" and that "[t]he status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M——— D——— S et al.*, 8 I & N 209, 213 (1958).

meaning of the statute has been changed by a longstanding administrative practice accepted by Congress as the appropriate construction.[4]

II

Administrative construction of a statute which conflicts with the express meaning of the statutory terms can be viewed as authoritative only if it appears that Congress has in fact accepted that construction, and the burden of proof necessarily is on the proponent of the administrative view. Since "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis," *Zuber* v. *Allen*, 396 U. S. 168, 185–186, n. 21 (1969), congressional silence standing alone cannot constitute congressional acceptance of a continuing administrative practice. The Court, however, elevates such silence to acquiescence by stressing proof of the practice and the absence of any indication that Congress has "repealed" it. *Ante*, at 10.

The administrative practice of treating daily commuters as immigrant aliens began in 1927 with the Depart-

[4] The effect of the Court's decision is not merely to stretch the meaning of the statute so as to include commuters within the permanent resident status. It also throws into question the meaning of "permanent resident" throughout the immigration laws with obvious anomalous consequences. See *Gooch* v. *Clark*, 433 F. 2d 74, 83–85 (CA9 1970) (Wright, J., dissenting). For example, the "spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence" are included in the second preference group for immigration visas. 8 U. S. C. § 1153 (a) (2). Thus a commuter's immediate kin are perhaps eligible for a preference although the commuter may himself have been entitled to no preference. The Government suggests that the commuter's status for other purposes is not before the Court and need not be decided. Brief for the Federal Parties, at 28. But the Court should be reluctant to accept an invitation to make an *ad hoc* decision with respect to one aspect of a statutory definition where it is clear that the definition is a central one which Congress has provided with the intent of having it applied generally.

ment of Labor's General Order No. 86.[5] Since Mexicans and Canadians were not subject to numerical limitations on entry into this country, this classification of the commuters had no practical effect upon them; informal documentation requirements were followed.[6] It was not until 1952 that Congress enacted a provision which could have limited the entry of commuters. Under § 212 (a)(14) of the 1952 Act, 66 Stat. 183, Congress provided that an immigrant could not enter if the Secretary of Labor certified that there were sufficient domestic workers available in his field of work or that his entry would have an adverse impact on the wages or working conditions of domestic workers. In 1965, Congress tightened this restriction by providing that aliens were inadmissible unless the Secretary of Labor certified that there were insufficient domestic workers available in the field and that the employment of aliens would not adversely affect wages and conditions of American workers. 8 U. S. C. § 1182 (a)(14).[7] In another 1965 amendment, Congress

[5] See the relevant text of General Order No. 86, *ante*, at 8–9 n. 25.

[6] The Court's opinion suggests that General Order No. 86 removed commuters from quota restrictions applicable to nonimmigrants. *Ante*, at 12. But Mexican and Canadian commuters had not been subject to any quotas. The Immigration Act of 1924 imposed no quotas on nonimmigrants, and Mexicans and Canadians were not subject to immigrant quotas. 43 Stat. 153. The General Order was designed primarily to prevent *quota* aliens from entering this country through Canada and Mexico as nonimmigrants. Letter from Secretary of Labor, dated November 26, 1928, in Appendix A of H. R. Rep. No. 2401, 70th Cong., 2d Sess. (1929). Informal documentation was maintained despite the classification of the commuters as immigrants because the immigration authorities did not view Congress as intending to interfere with the practice of border crossings by commuters. Report of the Select Commission on Western Hemisphere Immigration 101–102 (1968).

[7] The Secretary of Labor has not issued a certification allowing the entry of aliens seeking employment as farm laborers. 29 CFR §§ 60.2 (a)(2), 60.7 (Schedule B) (1974).

imposed the first quota on immigration from the Western Hemisphere, effective in 1968.[8]

There can be no reasonable presumption, therefore, that prior to 1952 Congress concerned itself with the propriety of the administrative classification of daily commuters under the immigration statutes.[9] Only with the passage of the 1952 legislation and subsequent amendments was there evidence of some possible concern on the part of Congress with the number of Mexican and Canadian aliens entering this country to work. Thus if Congress both expressed concern at the influx of alien workers but approved the commuter practice, then the Court's conclusion of congressional acquiescence in the administrative construction would have some persuasive force. Since that construction conflicts with the meaning of the statute on its face, however, something more than silence is required to establish acquiescence. Cf. *Leary* v. *United States*, 395 U. S. 6, 24–25 (1969). The only evidence of congressional acceptance cited by the Court is a brief description of the prior practice with respect to commuters contained in an extremely extensive report of an investigation of this Nation's immigration system published by the Senate Judiciary Committee in 1950.[10]

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[8] Section 21 (e), 79 Stat. 921.

[9] The Government refers to the inclusion of an early draft of a House bill, H. R. 5138, which ultimately became the Alien Registration Act of 1940, of a provision which would have prohibited any alien to enter this country from Mexico or Canada for the purposes of working or seeking employment. Hearing before Subcommittee No. 3, House Judiciary Committee, 76th Cong., 1st Sess., 3 (Ser. No. 3, April 12 and 13, 1939). The deletion of that provision prior to the reporting of the bill does not signal congressional approval of the administrative classification of commuters, but rather, as with the absence of quotas restricting the entry of Mexicans and Canadians, an unwillingness to restrict such entry which persisted at least until 1952.

[10] S. Rep. No. 1515, 81st Cong., 2d Sess., 535–536, 616 (1950).

The fact that "[n]o doubt as to the desirability of the practice was expressed," *ante*, at 13, will not overcome the fact that the terms of the statute passed two years later are incompatible with that practice, and neither the Court nor the Government can point to any express congressional acceptance of that practice in spite of the incompatibility.[11] The Court does say that since 1965 there have been numerous committee reports indicating congressional knowledge of the commuter problem and that Congress "has not reached a consensus that the administrative policy . . . is wrong." *Ante*, at 13. But the Court has clearly, and erroneously, placed the burden upon Congress to show that it has not accepted the practice rather than on the administrative agency to establish that Congress has acquiesced.

Very recently, in noting an exception to the principle of giving great weight to an administrative construction of a statute, we said that "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973). But the Court has allowed an agency to do so in this case.[12]

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[11] The Government concedes that the seasonal commuter practice grew after the *bracero* program had lapsed. Tr. of Oral Arg., at 53; Brief of the Federal Parties, at 75. See also Gordon, The Amiable Fiction—Alien Commuters Under Our Immigration Laws, in Employment of "Green Card" Aliens During Labor Disputes, Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor on H. R. Rep. No. 12667, 91st Cong., 1st Sess., 181, 183 (1969). Therefore, there is even less reason for believing that Congress acquiesced in the administrative classification of seasonal commuters.

[12] The majority cites *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964), and *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915), in support of its rationale of statutory construction. *Ante*, at 9. A comparison of the statutes and facts of those cases

III

The majority acknowledges the many political, economic, and social implications of the issues in this case and the need for the Court to legislate only when interstitial ambiguities in a statute require resolution, but it then rests its rejection of these unambiguous provisions of the immigration laws upon legislative considerations: the economic consequences to the alien commuters and to their communities of finding that the administrative practice is not consistent with the statute, the possible impact upon American border communities if those commuters who are legally capable of doing so choose to

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with the situation here, however, graphically reveals the extent of the majority's departure from accepted canons of construction.

In *Massachusetts Trustees* the Court was faced with the problem of harmonizing apparently inconsistent sections of the same statute governing an agency's authority. The literal language of the statute was found insufficiently precise to dispose of the question. Under these circumstances, the Court looked to the agency's practice, which could be given "some weight"; but the successive extensions by Congress of the agency's authority in the face of the agency's prior practice was not, even then, to be controlling. 377 U. S., at 241–245.

In *Midwest Oil Co.* the Presidential power to withdraw public lands from private acquisition which Congress by legislation had made free and open to occupation and purchase was found in the hundreds of such withdrawal orders, beginning in the early years of the Government, which had not been repudiated by Congress. In addition, the Executive order in question was issued seven years after the Secretary of the Interior, in response to a resolution of the Senate calling for information as to the authority for such withdrawals, sent to the Senate a report which cited the longstanding practice and the Executive's claim of authority. Congress took no action to repudiate that claim. Legislation soon after the order in question authorized such withdrawals by the President prospectively, expressed no intention on the part of Congress to repudiate past withdrawals, and left the question of the validity of past withdrawals to the courts. 236 U. S., at 469–471, 480–481, 481–483. Nothing in this case remotely resembles the historical record upon which congressional acquiescence was premised in *Midwest Oil Co.*

take up actual residence in this country, and the need to avoid negative effects upon this country's relations with Mexico and Canada. *Ante*, at 13–14. But these interests, as well as the opposing interests of domestic labor, form part of the congressional calculus, and this Court is hardly equipped or authorized to predict by its decision the direction in which that balance of interests will ultimately tip. Because I believe that the Court has strayed from the neutral judicial function of applying traditional principles of statutory construction, I must respectfully dissent.